(19,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 73.

THE OTIS COMPANY, PLAINTIFF IN ERROR,

vs.

THE LUDLOW MANUFACTURING COMPANY AND THE LUDLOW CORDAGE COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk,

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with a water mill, to wit—a cotton mill, thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit—the Chicopee river, and is entitled to use for working said mill the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privileges for the aforesaid purpose of working said mill is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company.

2 The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901 of some land above the same, by the erection of a suitable building and the purchase of proper machinery to transmit the power so developed to said mill, was in excess of two hundred and fifty thousand dollars ($250,000) including the cost of said machinery and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April 1901; and on the 26th day of said April the plaintiff commenced to use and has since, with only slight interruptions, continuously used said water power and privilege for the purpose of working its aforesaid mill.

Said dam was not erected to the injury of any mill either above

or below it on the same stream, nor to the injury of any mill site on the same stream on which a mill or mill dam had been lawfully erected or used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mill is a reasonable and necessary one.

3. On the 26th day of September A. D. 1882 the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement in writing of the tenor following, that is to say—

3 Memorandum of Agreement between the Otis Company and Edwin D. Metcalf, Sept. 26, 1882.

Agreement made this 26th day of Sept., 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2nd. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3rd. Said Metcalf agrees to then convey to said company in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consum-ation of said purchase of said Shearer property, and not in any unreasonable manner do anything to interfere with such purchase, and said property and no part thereof shall be purchased by either of said parties, or anyone in their behalf except in pursuance of this agreement.

4 5th. Until such purchase shall be consum-ated all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power, which shall afford more than

21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its, or their power, which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property, within six months from the date hereof, but in the event of such failure these presents shall become null and void, at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consum-ated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D METCALF.

And thereafter, to wit--on the 31st day of October, 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all that portion of the Green property owned by him situated on the northerly side of said river and lying above a point in range with the stake referred to in the 3rd article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2nd article of said agreement. And at the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf together with said lands theretofore owned by him constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited.

4. The defendant The Ludlow Cordage Company was organized in part by stockholders of the Ludlow Manufacturing Company. The two corporations have common interests and are in some respects under a common management. The defendant corporations, for their common benefit and for their common use, purchased of said Metcalf said land conveyed to him by the plaintiff as aforesaid, as well as said other lands owned by him, and, for their common benefit as well as to avoid the easements, restrictions and incumbrances upon the land so conveyed created by said 6th article of said agreement, had the title to said lands conveyed by said Metcalf to said

Ludlow Cordage Company. The defendant corporations
6 made said purchase, paid said Metcalf therefor, and took said conveyance with knowledge and notice of said agreement and of the aforesaid incumbrances, conditions and restrictions thereby created. The Ludlow Manufacturing Company, at or about the time of said conveyance to said Ludlow Cordage Company from said Metcalf, acquired title to certain other parcels of land on said Chicopee river lying below the premises conveyed to the Ludlow Cordage Company by Metcalf as aforesaid, and extending on the banks of the stream more than half a mile. These parcels of land, for convenience, are hereinafter called "A." Some miles below "A" on said stream, but separated from "A" by mill sites and water mills belonging to strangers to this suit, are mills belonging to the Ludlow Manufacturing Company, some of which are operated by it and some of which are operated by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A" for the purpose, amongst others, of working an electric power plant on said "A" to generate electricity to be transmitted to one or more of said mills of the Ludlow Manufacturing Company below "A," and for the purpose, amongst others, of selling electricity to whoever may purchase it. Said dam and power plant are nearly completed; and said dam is so constructed and is of such a height that when its gates are closed it will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and flood the plaintiff's mill site, and will cause a back water which will flow out and destroy said mill privilege and power developed by the plaintiff as aforesaid, and will in part shut down the plaintiff's mill and machinery therein, and will flood the building and machinery so placed by the plaintiff on said millsite as aforesaid and will cause the plaintiff irreparable injury. Said
7 dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of the reasonable or lawful needs and requirements of the defendants. The water power of the stream is sufficient for the reasonable use and lawful requirements of the plaintiff and defendants; but the defendants have erected said dam to an unreasonable height as aforesaid for the purpose of preventing the plaintiff's enjoying necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid.

Unless the defendants are restrained by the order of this court they will forthwith close the gates of said dam and raise the waters of said stream to the aforesaid unreasonable height of more than twelve feet above said bolts and create said back water and flow out and destroy the plaintiff's aforesaid water power and privilege, and shut down its mill and flood and injure its buildings and machinery and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the plain-

tiff's said mill site, backing the waters of said stream upon the plaintiff's said mill and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained

8 by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mill and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

OTIS COMPANY,
By GEORGE F. FABYAN, Treasurer.

I, George F. Fabyan of Brookline in the county of Norfolk and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, on oath depose and say as follows:

The facts and circumstances stated in the first and second paragraphs of the foregoing bill of complaint are true and within my own personal knowledge. The facts and circumstances stated in the third, fourth and fifth paragraphs of said bill are believed by me to be true from information which I have received from Roscius C. Newell, Edwin D. Metcalf and others.

GEORGE F. FABYAN.

Oct. 5, 1901.

Subscribed and sworn to before me.

BOYD B. JONES,
Justice of the Peace.

Bill filed October 15, 1901.

9 Copy.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

[Seal of the Superior Court.]

To the Ludlow Manufacturing Company and the Ludlow Cordage Company, each a manufacturing corporation organized under the laws of said Commonwealth and having a usual place of business in Boston, in our said county of Suffolk, Greeting:

We command you that you appear before our superior court, at the rules to be holden at Boston within our said county of Suffolk, on the first Monday of November next, then and there to answer to

a bill of complaint exhibited against you in our said court, by the Otis Company, a manufacturing corporation organized under the laws of said Commonwealth and having a usual place of business in said Boston and to do and receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf, provided.

Witness, Albert Mason, Esquire, at Boston, the fifteenth day of October in the year of our Lord one thousand nine hundred and one.

JOS. A. WILLARD, Clerk.

9½ [Endorsed:] Hurlburt, Jones & C. No. 569. Eq. Subpœna Otis Company *vs.* Ludlow Mfg. Co. & another. Copy.

Officer's Return.

SUFFOLK, *ss:*

BOSTON, October 18th, 1901.

I this day served the within subpœna upon the within named The Ludlow Manufacturing Company and The Ludlow Cordage Company by delivering to C. W. Hubbard, Esq. treasurer of said Ludlow Manufacturing Company and by delivering to C. N. Wallace, Esq. treasurer of said Ludlow Cordage Company, each an attested copy thereof for their appearance at court as within directed.

ALBERT C. TILDEN,
Deputy Sheriff.

Fees.

Service	1.00
Copies	2.00
Travel	.08
	$3.08

10 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } *ss:*

Superior Court. In Equity.

OTIS COMPANY
v.
THE LUDLOW MANUFACTURING COMPANY ET AL.

Plaintiff's Motion.

And now comes the plaintiff and says that the defendants have closed the waste gates of their said dam and are flowing back the waters of said Chicopee river so that unless restrained by an inter-

locutory order of this court the mill site of the plaintiff and *their* said lower dam will be flowed, and the head of water raised by said lower dam reduced and destroyed and the working of the plaintiff's mill be interrupted and interfered with. Wherefore the plaintiff prays this court for an interlocutory injunction as prayed for in its bill restraining the defendants from closing said waste pipes and flowing the plaintiff's mill site until the further order of the court.

By BOYD B. JONES,
Its Solicitor.

Oct. 31, 1901.

11 SUFFOLK, *ss:*

Superior Court. In Equity.

OTIS COMPANY
v.
LUDLOW MFG. CO.

This cause came on to be heard October 31st 1901 upon an application by the plaintiff for a preliminary restraining order as prayed in the bill, and thereupon the defendant's attorney stating that the waste gates in the Ludlow Manufacturing Co.'s dam have not been closed, or if closed shall be opened, and shall not again be closed without giving the plaintiff forty-eight hours' notice thereof no restraining order is made at this time: this order being made without prejudice in any way to the rights of the plaintiff to further apply for such restraining order or of the defendants to oppose the granting of the same.

By the court:

HENRY E. BELLEW, Ass't Cl'k.

Oct. 31, 1901.

12 COMMONWEALTH OF MASSACHUSETTS, Suffolk, *ss:*

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Manufacturing Company.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of plaintiff's bill, and on the contrary avers that prior to any act of the plaintiff in the way of developing its said property this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since continuously and with reasonable despatch proceeded with its said work intending to put in operation a mill, for the working of which the water of said river is to be applied.

13 3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that the Ludlow Cordage Company purchased certain real estate from said Metcalf, but whether it included that conveyed by the plaintiff to said Metcalf this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

All the other allegations contained in the fourth paragraph of plaintiff's bill relating to the purchase of said Metcalf's land this defendant denies, and it denies that it had any notice of the agreement referred to in plaintiff's bill or of the terms thereof.

This defendant admits that at or about the time of the conveyance to the Ludlow Cordage Company of the Metcalf land it acquired title to certain parcels of land on said Chicopee river lying below the premises conveyed to said Ludlow Cordage Company, but whether these parcels are identical with those designated in plaintiff's bill as "A" this defendant can neither admit nor deny, but leaves it to be hereafter explained.

14 Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company, it had acquired from time to time sundry parcels of land including that upon which its dam is now erected and that all of said purchases were in connection with its plan then already conceived and determined to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

This defendant admits that some distance below its said dam

there is a water mill belonging to a stranger to this suit and below this last mentioned mill are mills of this defendant, a portion of the floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

5. If by the description "A" plaintiff refers to lands purchased by this defendant at or about the time of the conveyance by said Metcalf to said Ludlow Cordage Company, this defendant denies that it is building a dam on such land, but it admits that it has been engaged in building a dam on property acquired by it in or about the year 1891 for the purpose of working its mills and for other purposes reasonably incident to its property, and said dam is now completed.

If the allegation be material, which this defendant denies, this defendant denies that its dam is being constructed to an unreasonable and unnecessary height or with any purpose to prevent the plaintiff's enjoyment of its property, except so far as may inevitably result, but on the contrary this defendant avers that all the power to be generated by said dam is reasonably required by it in the operation and legitimate development of its mills and mill property.

All other allegations contained in the fifth paragraph of plaintiff's bill this defendant denies.

15 6. This defendant avers further that at the time the plaintiff commenced work upon its property it knew that the defendant was then and for some time had been proceeding with the erection of its dam and knew the extent to which the same when completed would set back the waters of said river, but notwithstanding this knowledge the plaintiff took no steps to protect its rights but proceeded with its work in utter disregard of the consequences, and the defendant avers that the plaintiff being at the outset and at all times since in a position to have determined the legal rights of the parties and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

LUDLOW MANUFACTURING CO.,
By its Att'ys, BROOKS & HAMILTON.
R.
CARROLL & McCLINTOCK.
R.

Filed 8 Nov. 1901.

16 COMMONWEALTH OF MASSACHUSETTS, Suffolk, ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Cordage Company.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2 This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

17 4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management.

This defendant admits that it purchased for its own use certain real estate from said Metcalf including that conveyed by the plaintiff to said Metcalf, and other land owned by him, but it denies that said purchase was made for the common benefit of the Ludlow Manufacturing Company and itself.

This defendant denies that at the time of said purchase it had notice of the agreement referred to in plaintiff's bill, and it denies that said agreement created or established any easements, restrictions or encumbrances upon the land conveyed to it or that the conveyance was made to it with any purpose to avoid any such easements, restrictions or encumbrances.

This defendant neither admits nor denies the other allegations contained in said fourth paragraph relating to the purchase by the Ludlow Manufacturing Company — the real estate upon said Chicopee river and to the location of other mills upon said stream, but leaves the plaintiff to prove the same so far as it may deem them material.

5. This defendant neither admits nor denies the allegations contained in the fifth paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

BROOKS & HAMILTON,
CARROLL & McCLINTOCK,
Def't's Att'ys.

Filed 8 Nov. 1901.

18 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,
and
THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW CORDAGE Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Motion to Amend Bill of Complaint.

And now comes the plaintiff and moves to amend its bill of complaint in the above entitled suit so that the first paragraph thereof will read as follows:—

"The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit—a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit—the Chicopee river, and is entitled to use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston and Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield

19 road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company. The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901, of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill which was in excess of two hundred and fifty — dollars ($250,000.) including the cost of said

machinery and building, which was in excess of fifteen thousand dollars ($15,000)."

And to amend the second paragraph of said bill of complaint by substituting the word "mills" for the word "mill" in the sixth line and also in the last line of said paragraph.

And to amend the fifth paragraph of said bill by striking out the first 24 lines thereof and inserting in place thereof the following to wit:

"The Ludlow Manufacturing Company is building a dam on said "A" which is nearly completed and which when completed and when its gates are closed will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill privileges and power developed by the plaintiff as aforesaid, and will in part shut down said mills of the plaintiff and the machinery thereof, and will flood said power mill and the machinery therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury. Said dam is being erected by said defendants to an unreasonable and unnecessary height to develope a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid."

And to further amend said fifth paragraph by substituting the word "mills" for the word "mill" in the 30th, 35th, and 44th lines of said paragraph, and by striking out the word "said" and substituting therefor the word "the" in the 47th line of said paragraph.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

MAY 20, 1902.

Then personally appeared George F. Fabyan of Brookline in the county of Norfolk, and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, and being duly sworn on oath deposes and says as follows:—"The facts and circumstances stated in this motion in relation to the first and second paragraphs of the bill of complaint are true and within my own personal knowledge, and the facts and circumstances stated in the above motion in reference to the fifth paragraph are believed by me to be true."

Before me

FREDERICK P. CABOT,
Justice of the Peace.

May 21, 1902.—Amendment allowed by consent.

21 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss.:

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Amended Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit;—a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit;—the Chicopee river, and is entitled to use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the

22 record title to which stands in the name of the Ludlow Cordage Company.

The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901 of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill, was in excess of two hundred and fifty thousand dollars ($250,000.) including the cost of said machinery and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April 1901; and on the 26th day of said April the plaintiff commenced to use and has since, with only slight interruptions, continuously used said water power and privilege for the purpose of working its aforesaid mills.

Said dam was not erected to the injury of any mill either above or below it on the same stream, nor to the injury of any mill site on

the same stream on which a mill or mill dam had been lawfully erected and used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mills is a reasonable and necessary one.

3. On the 26th day of September A. D. 1882, the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement in writing of the tenor following, that is to say,—

23 Memorandum of Agreement Between the Otis Company and Edwin D. Metcalf.

Sept. 26, 1882.

Agreement made this 26th day of Sept., 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2nd. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3rd. Said Metcalf agrees to then convey to said company in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any unreasonable manner to do anything to interfere with such purchase, and said property and no part thereof shall be purchased by either of said parties, or anyone in their behalf except in pursuance of this agreement.

24 5th. Until such purchase shall be consummated all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power, which shall afford more than

21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its, or their power, which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property, within six months from the date hereof, but in the event of such failure these presents shall become null and void, at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

And thereafter, to wit;—on the 31st day of October 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all that portion of the Green property owned by him situated on the northerly side of said river and lying above a point in range with the stake referred to in the 3rd article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2nd article of said agreement. And at the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf together with said lands theretofore owned by him constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited.

4. The defendant The Ludlow Cordage Company was organized in part by stockholders of the Ludlow Manufacturing Company. The two corporations have common interests and are in some respects under a common management. The defendant corporations, for their common benefit and for their common use, purchased of said Metcalf said land conveyed to him by the plaintiff as aforesaid, as well as said other lands owned by him, and, for their common benefit as well as to avoid the easements, restrictions and incumbrances upon the land so conveyed created by said 6th article of said agreement, had the title to said lands conveyed by said Metcalf to said

Ludlow Cordage Company. The defendant corporations made said purchase, paid said Metcalf therefor, and took said conveyance with knowledge and notice of said agreement and of the aforesaid
26 incumbrances, conditions and restrictions thereby created.

The Ludlow Manufacturing Company, at or about the time of said conveyance to said Ludlow Cordage Company from said Metcalf acquired title to certain other parcels of land on said Chicopee river lying below the premises conveyed to the Ludlow Cordage Company by Metcalf as aforesaid, and extending on the banks of the stream more than half a mile. These parcels of land, for convenience, are hereinafter called "A." Some miles below "A" on said stream but separated from "A" by mill sites and water mills belonging to strangers to this suit, are mills belonging to the Ludlow Manufacturing Company, some of which are operated by it and some of which are operated by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A," which is nearly completed and which when completed and when its gates are closed will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill privileges and power developed by the plaintiff as aforesaid, and will in part shut down said mills of the plaintiff and the machinery thereof, and will flood said power mill and the machinery therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury. Said dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful, necessary and
27 reasonable use of the waters of said stream and of the water power and privileges developed by the plaintiff as aforesaid.

Unless the defendants are restrained by the order of this court they will forthwith close the gates of said dam and raise the waters of said stream to the aforesaid unreasonable height of more than twelve feet above said bolts and create said back water and flow out and destroy the plaintiff's aforesaid water power and privilege, and shut down its mills and flood and injure its buildings and machinery and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and

that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with the building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

28 I, George F. Fabyan of Brookline in the county of Norfolk, and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, on oath depose and say as follows;

The facts and circumstances stated in the first and second paragraphs of the foregoing amended bill of complaint are true and within my own personal knowledge. The facts and circumstances stated in the third, fourth and fifth paragraphs of said amended bill are believed by me to be true from information which I have received from others.

GEORGE F. FABYAN.

Before me,

FREDERICK P. CABOT,
Justice of the Peace.

May 20, 1902.

[Endorsed:] 569 Eq. Otis Company vs. Ludlow Mfg. Co. & *al.* Plaintiff's amended bill of complaint.

29 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Manufacturing Company to Plaintiff's Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of plaintiff's bill, and on the contrary avers that prior to

any act of the plaintiff this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of *of* Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since continuously and with reasonable despatch proceeded with its said work intending to put in operation a mill, for the working of which the water of said river is to be applied.

30 3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that the Ludlow Cordage Company purchased certain real estate from said Metcalf, but whether it included that conveyed by the plaintiff to said Metcalf this defendant neither admits nor denied, but leaves the plaintiff to prove the same so far as it may be deemed material.

All the other allegations contained in the fourth paragraph of plaintiff's bill relating to the purchase of said Metcalf's land this defendant denies, and it denies that it had any notice of the agreement referred to in plaintiff's bill or of the terms thereof.

This defendant admits that at or about the time of the conveyance to the Ludlow Cordage Company of the Metcalf land it acquired title to certain parcels of land on said Chicopee river lying below the premises conveyed to said Ludlow Cordage Company, but whether these parcels are identical with those designated in plaintiff's bill as "A" this defendant can neither admit nor deny, but leaves it to be hereafter explained.

31 Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company, it had acquired from time to time sundry parcels of land including that upon which its dam is now erected and that all of said purchases were in connection with its plan then already conceived and determine- to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

This defendant admits that some distance below its said dam there is a water mill belonging to a stranger to this suit and below this last mentioned mill are mills of this defendant, a portion of the

floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

5. If by the description "A" plaintiff refers to lands purchased by this defendant at or about the time of the conveyance by said Metcalf to said Ludlow Cordage Company, this defendant denies that it is building a dam on such land, but it admits that it has been engaged in building a dam on property acquired by it in or about the year 1891 for the purpose of working its mills and for other purposes reasonable incident to its property, and said dam is now completed, and that since commencing its occupation as aforesaid this defendant has completed and put in operation a mill for the working of which the water of said stream is applied.

This defendant denies the allegation that its said dam is being constructed to an unreasonable and unnecessary height or with any purpose to prevent the plaintiff's enjoyment of its property, except so far as may inevitable result, but on the contrary this defendant avers that all the power to be generated by said dam is reason-
32 able required by it in the operation and legitimate development of its mills and mill property.

All other allegations contained in the fifth paragraph of plaintiff's bill this defendant denies.

6. This defendant avers further that at the time the plaintiff commenced work upon its property it knew that the defendant was then and for some time had been proceeding with the erection of its dam and knew the extent to which the same when completed would set back the waters of said river, but notwithstanding this knowledge the plaintiff took no steps to protect its rights but proceeded with its work in utter disregard of the consequences, and the defendant avers that the plaintiff being at the outset and at all times since in a position to have determined the legal rights of the parties and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

By Def't's Att'ys, WALTER S. ROBINSON.
JAS. B. CARROLL.
WM. H. BROOKS.

May 24, 1902.—Answer filed by consent.

33 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss.:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Cordage Company to Plaintiff's Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

34 4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management.

This defendant admits that it purchased for its own use certain real estate from said Metcalf including that conveyed by the plaintiff to said Metcalf, and other land owned by him, but it denies that said purchase was made for the common benefit of the Ludlow Manufacturing Company and itself.

This defendant denies that at the time of said purchase it had notice of the agreement referred to in plaintiff's bill, and it denies that said agreement created or established any easements, restrictions or encumbrances upon the land conveyed to it or that the conveyance was made to it with any purpose to avoid any such easements, restrictions or encumbrances.

This defendant neither admits nor denies the other allegations contained in said fourth paragraph relating to the purchase by the Ludlow Manufacturing Company of the real estate upon said Chicopee river and to the location of other mills upon said stream, but

leaves the plaintiff to prove the same so far as it may deem them material.

5. This defendant neither admits nor denies the allegations contained in the fifth paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same as far as it may deem them material.

By Def't's Att'ys, WALTER S. ROBINSON,
JAS. B. CARROLL,
WM. H. BROOKS.

Filed by consent May 24, 1902.

35 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court. In Equity.

Between

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Amended Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit, a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit, the Chicopee river, and is entitled for use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of
36 said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company.

The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition, in 1900 and 1901, of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill, was in excess of two hundred and fifty thousand dollars ($250,000), including the cost of said machinery

and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April, 1901; and on the 26th day of said April, the plaintiff commenced to use and has since, with only slight interruptions, continuously used and is now using said water power and privilege for the purpose of working its aforesaid mills.

Said dam was not erected to the injury of any mill either above or below it on the same stream, nor to the injury of any mill site on the same stream on which a mill or mill dam had been lawfully erected and used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mills is a reasonable and necessary one.

3. On the 26th day of September, A. D. 1882, the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement, in writing, of the tenor following, that is to say—

Memorandum of Agreement between the Otis Company and Edwin D. Metcalf, September 26, 1882.

Agreement made this 26th day of September, 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

37 1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property, as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2d. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf, in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3d. Said Metcalf agrees to then convey to said company, in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river, which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any unreasonable manner do anything to interfere with such purchase, and said property and no part thereof shall be purchased by

either of said parties, or anyone in their behalf, except in pursuance of this agreement.

5th. Until such purchase shall be consummated, all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property within six months from the date hereof, but in the event of such failure these presents shall become null and void at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

And thereafter, to wit, on the 31st day of October, 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all said portion of the Green property owned by him situated on said
38 opposite side of said river and lying above a point in range with the stake referred to in the 3d article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2d article of said agreement. At the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf, together with said lands theretofore owned by him, constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited. Said agreement has never been violated nor annulled.

4. The defendant, The Ludlow Cordage Company, was organized in part by the stockholders of the Ludlow Manufacturing Company,

and the two corporations heretofore have been and now are under common management. On or about the 21st of November, A. D. 1898, the Ludlow Manufacturing Company purchased of said Metcalf said land theretofore conveyed to him by the plaintiff and said other land of said Metcalf, excepting that conveyed by him to the plaintiff as aforesaid, and thereafter, to wit, on or about the third day of December, A. D. 1898, the Ludlow Manufacturing Company paid said Metcalf the purchase price for said land, to wit, fifteen thousand dollars ($15,000), and took a quit-claim deed thereof from said Metcalf to the Ludlow Cordage Company. The Ludlow Manufacturing Company made said purchase and payment and took said deed in the name of the Ludlow Cordage Company, with knowledge of said agreement between Metcalf and the plaintiff and with knowledge that neither said Metcalf nor his assigns had any right to construct a dam in the development of the water power of said river which would develop more than 21 32/100 feet fall on the land so purchased by the Ludlow Manufacturing Company, or which would raise the water of said river to a greater height than said copper bolt.

The Ludlow Manufacturing Company purchased said land for its own purposes, paid for it with its own funds, and, by virtue of the transactions herein recited, is the legal and equitable owner of the land so purchased, enjoying and exercising full control over the same. It took said deed in the name of the Ludlow Cordage Company, in order to conceal the true ownership of said land and have it appear that the Ludlow Manufacturing Company was not in law or in equity the owner of said premises, and was not in law or equity an assign of said Metcalf, and was not in law or
39 equity bound by the aforesaid covenants, agreements and restrictions created in favor of the plaintiff by the aforesaid agreement between the plaintiff and said Metcalf.

The Ludlow Manufacturing Company, at or about the time of said purchase from said Metcalf by it, acquired title by deeds to other parcels of land and flowage rights on said Chicopee river, extending from said premises so purchased by it from Metcalf to the site of its dam hereinafter referred to, which site is hereinafter called "A."

Some miles below "A" on said stream, separated from A by mill sites and water mills belonging to strangers to this suit, are mills belonging to and operated by the Ludlow Manufacturing Company, and a floor of one of said mills is used by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A," in the development of the water power of said river on the land so purchased by the Ludlow Manufacturing Company of Metcalf and conveyed by said Metcalf as aforesaid, which is nearly completed and which, when completed, will afford much more than 21 32/100 feet fall on said land so purchased and conveyed, and will raise the waters of said stream upon the land so purchased and conveyed, as well as upon the aforesaid land of the plaintiff to the

plaintiff conveyed by said Metcalf as aforesaid, much more than 12 feet higher than said copper bolt, and which, by reason of creating the aforesaid excess of fall and by reason of raising the water to the aforesaid excessive height, will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill power and privilege developed by the plaintiff as aforesaid, will interfere with the operation of the plaintiff's water wheels in said power mill, and will flood said power mill and the machinery and wheels therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury.

Said dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful, necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid.

6. The Ludlow Manufacturing Company claims that before the plaintiff, by surveying or otherwise, entered upon the work preliminary to building the plaintiff's dam, or before the plaintiff began to construct said dam, the Ludlow Manufacturing Company commenced on its said mill site the work preliminary to constructing its dam, and also the work of excavating for the erection of its dam, and that, by said preliminary work and by excavating so commenced as aforesaid, the Ludlow Manufacturing Company, under sections 1 and 2 of chapter 190 of the Public Statutes of Massachusetts (Rev. Laws, chap. 196, §§ 1, 2), acquired the right to erect its said dam, now in process of building, as aforesaid, to a height of fifty-one feet, and thereby raise the waters of said stream fifty-one feet above the usual and ordinary height thereof; and to thereby afford and develop more than 21 32/100 feet fall on said land so purchased by the Ludlow Manufacturing Company of said Metcalf as aforesaid; and to thereby raise the waters of said stream on said land purchased from Metcalf much more than twelve feet higher than said copper bolt; and to thereby flow said mill site of the plaintiff, including said land conveyed to it by said Metcalf; and to thereby raise the waters of said stream on said land of the plaintiff, including that conveyed to the plaintiff by Metcalf, greatly in excess of the usual and ordinary height thereof, so that the plaintiff will not have the 19 65/100 feet of fall provided for by the sixth article of said agreement and so that said waters will flood the natural banks of said stream on the plaintiff's land, flood the plaintiff's mill site and flow out and destroy the power mill, the mill privilege and water power developed by the plaintiff as aforesaid.

If said dam of the Ludlow Manufacturing Company, in process of construction as aforesaid in the development of its said power, be so constructed that it will not afford more than 21 32/100 feet fall

on said land so purchased by the Ludlow Manufacturing Company of said Metcalf as aforesaid, the waters of said stream will not be raised higher than said copper bolt, said mill site of the plaintiff and said land conveyed to it by said Metcalf as aforesaid will not be flowed, the waters of said stream thereon will not be raised above the usual and ordinary height thereof and said mill site of the plaintiff and said mill privilege and water power developed by the plaintiff as aforesaid will not be flowed out or in any way injured or affected.

7. The plaintiff denies that the Ludlow Manufacturing Company began said preliminary work and said work of constructing said dam as aforesaid before the plaintiff began the work of construction of its said dam as aforesaid, and denies that the Ludlow Manufacturing Company commenced the occupation as a mill site of its said mill site before the plaintiff began the occupation as a mill site of its said mill site and of said land conveyed to it by Metcalf as aforesaid; and the plaintiff says that the Ludlow Manufacturing Company has not yet completed the erection of its said dam or raised the waters of said stream thereby or flooded the plaintiff's land or in any way interfered with the operation of said mill of the plaintiff or the use or enjoyment of the plaintiff of its aforesaid water power development and power mill.

8. Said sections 1 and 2 of chapter 190 of the Public Statutes of Massachusetts (Rev. Laws, chap. 196, sects. 1 and 2) are as follows:—

41 "SECTION 1. A person may, as hereinafter provided, erect and maintain a water mill and a dam to raise water for working it, upon and across any stream not navigable.

"SECTION 2. Such dam shall not be erected to the injury of a mill lawfully existing above or below it on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill dam has lawfully been erected and used, unless the right to maintain a mill on such last-mentioned site has been lost by abandonment or otherwise; nor shall a mill dam be erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if, within a reasonable time after commencing such occupation he completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance or authority from the owner as would be necessary to convey land."

There are no provisions in said chapters nor in the statutes of this Commonwealth for notice to riparian proprietors or land owners of the intention of another person to erect a dam which will flow or injure the land or property of such riparian proprietor or land owner. The plaintiff, before it commenced the construction of its said dam and the occupation as a mill site of its mill site and of said land conveyed to it by Metcalf as aforesaid, had no notice or knowledge that the Ludlow Manufacturing Company, or any other person,

intended to erect a dam which would flow said mill site of the plaintiff, or which would flow said land conveyed to the plaintiff by said Metcalf as aforesaid, or which would flow out, interfere with or destroy said power mill or the mill privilege and water power developed by the plaintiff as aforesaid.

9. If it is the intention and meaning of said statutes hereinbefore recited that a riparian proprietor can, by commencing to occupy his mill site as such or by commencing the work preliminary to the erection of a dam thereon or by commencing to erect such dam, thereby acquire the right to flow out and injure a mill site belonging to an upper riparian proprietor on the same stream and in actual occupation as such, and the water power thereon developed, and a water mill thereon completed, in actual use and worked by said water power, then the plaintiff says that said statutes are in violation of the fifth and fourteenth amendments of the Constitution of the United States and of the constitution of Massachusetts.

Unless the defendants are restrained by the order of this court they will forthwith, in violation of the plaintiff's rights both as a property owner and as a party to said agreement, complete said dam, close the gates thereof and raise the waters of said stream, create said back water and flow out and destroy the plaintiff's aforesaid mill site, water power and privilege, and shut down its mills, and flood and injure its buildings and machinery, and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the
42 plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with the building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

By BOYD B. JONES,
Plaintiff's Solicitor.

Filed by consent Dec. 7, 1903.

Answer of Defendant Ludlow Cordage Company to Plaintiff's Second Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September, 1882, and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management. This defendant admits that it purchased for its own use certain real estate from said Metcalf, including
43 that conveyed by the plaintiff to said Metcalf and other land owned by him; and that the purchase price for said land was $15,000, which it paid to said Metcalf.

This defendant denies all the other allegations contained in said 4th paragraph.

5. This defendant neither admits nor denies the allegations contained in the 5th paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

6. This defendant demurs to the 6th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

7. This defendant demurs to the 7th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same, so far as it may deem them material.

8. This plaintiff demurs to the 8th paragraph of the plaintiff's

bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

9. This defendant demurs to the 9th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite the facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
JAMES B. CARROLL,
WALTER S. ROBINSON,
Its Attorneys.

Filed by consent Dec. 7, 1903.

44 Answer of Defendant Ludlow Manufacturing Company to Plaintiff's Second Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as they may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of the plaintiff's bill, and, on the contrary, avers that, prior to any act of the plaintiff, this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well-defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since, continuously and with reasonable despatch, proceeded with its said work, intending to put in operation a mill, for the working of which the water of said river is to be applied.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff, in September, 1882, and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that on or about the third day of December, 1898, certain lands were conveyed by Metcalf, by a quitclaim deed, to the Ludlow Cordage Company, and that the purchase price for said land was $15,000; but whether such conveyance included land conveyed by the plaintiff to Metcalf, this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

This defendant denies that at or about the time of said conveyance from Metcalf to the Ludlow Cordage Company it acquired title by deeds to other parcels of land and flowage rights on said Chicopee river, extending from said Metcalf land to the site of defendant's dam; but it admits that in the year 1899 it made several purchases of land along said Chicopee river below said Metcalf land.

45 This defendant admits that at some distance below its said dam there is a water mill belonging to a stranger to this suit, and below this last-mentioned mill are mills of this defendant, a portion of the floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

All the other allegations contained in the 4th paragraph of the plaintiff's bill this defendant denies.

Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company it had acquired from time to time sundry parcels of land, including that purchased in the year 1891, upon which its dam is now erected, and that all of said purchases were in connection with its plan, then already conceived and determined, to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

5. This defendant admits that it has been engaged in building a dam and other structures on the property acquired by it, in and about the year 1891, for the purpose of working its mills and for other purposes reasonably incident to its property, and said dam is now completed; and that since its said appropriation and occupation as aforesaid, this defendant has completed and put in operation a mill for the working of which the water of said stream is applied.

All other allegations contained in said 5th paragraph this defendant denies.

6. This defendant demurs to the 6th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action; but on the contrary purports to set out the defendant's contention; all of which is contrary to the rules of pleading. Without waiving its rights under its demurrer, this defendant denies that said paragraph correctly states its contention, but leaves the plaintiff to prove

the allegations therein contained, so far as it may deem them material.

7. This defendant demurs to the 7th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer this defendant avers that it had made its appropriation and occupation, as hereinbefore stated, and had completed all preliminary work and had begun the work of constructing said dam, as aforesaid, before the plaintiff began the work of construction of its said dam, as aforesaid, and further avers that it commenced the occupation as a mill site of its said mill site before the plaintiff began the occupation as a mill site of its said alleged mill site and of the land conveyed to it by Metcalf, as aforesaid.

All the other allegations contained in said 7th paragraph this defendant denies.

46 8. This defendant demurs to the 8th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer, this defendant denies all the other allegations contained in said 8th paragraph.

9. This defendant demurs to the 9th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer this defendant denies that it does or will violate any of the plaintiff's legal rights by the erection of its said dam.

10. This defendant avers further, that at the time the plaintiff commenced work upon its property it knew that the defendant was then, and for some time had been, proceeding with the erection of its dam and knew the extent to which the same, when completed, would set back the waters of said river; but notwithstanding this knowledge the plaintiff took no steps to protect its rights, but proceeded with its work in utter disregard of the consequences; and the defendant avers that the plaintiff being at the outset, and at all times since in a position to have determined the legal rights of the parties, and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
JAMES B. CARROLL,
WALTER S. ROBINSON,
Its Attorneys.

Filed by consent Dec. 7, 1903.

Plaintiff's Replication.

The plaintiff joins issue in the answer of each of the defendants.

By Its Solicitors, HURLBURT, JONES & CABOT.

Filed by consent as of Dec. 2, 1903.

Interlocutory Decree.

BRALEY, *J.*:

And now on reading the pleadings in the above case and hearing counsel for the respective parties and on consideration thereof it is ordered and decreed that this cause be and hereby is referred
47 to James R. Dunbar, Esq., of Brookline in the county of Norfolk as special master of this court to hear the parties and their evidence, to find the *the* facts together with his rulings of law and so much of the evidence and offers of proof as he deems necessary for a proper understanding of such rulings, and report the same to this court.

By the court,

HENRY E. BELLEW,
Assistant Clerk.

April 4, 1902.

Master's Report.

Pursuant to the decree to which this is annexed, I met the parties and their counsel, and witnesses, and heard their evidence, and the arguments of the counsel, and now report as follows:—

There were many hearings, and I took a view of the mills and dams of the plaintiff and of the defendant, The Ludlow Manufacturing Company, and of the water privileges connected therewith upon the Chicopee river, including the premises occupied by the Ludlow Cordage Co.

During the progress of the hearings, the defendants and plaintiff signed and submitted to the master the following stipulation and agreement:—

"Stipulation A."

"The parties agree as follows:—

The mean elevation of the crest of the plaintiff's dam as built without the flash board is 278.29 feet; with the present flash board unchanged, the mean elevation of plaintiff's dam as built is 279.29.

If flash boards are used as provided for in the plan of dam which plaintiff has filed with county commissioners of Hampden county, the mean elevation of dam would be 283 feet.

The height of the dam as built, without any flash board, from the top of the apron is 19.29 feet.

The ordinary net working head of water without any flash board is not more than 18.56 feet nor less than 18 feet.

The length of plaintiff's dam is 353 feet including power house. The rollway of plaintiff's dam exclusive of piers is 210 feet.

The dam is built on the plaintiff's land as described in deeds Exhibits 4, 5, 7 and 8 across the Chicopee river, and is three quarters of a mile below the cotton mill of the plaintiff on said river at Three Rivers called the Palmer mill, which latter mill the plaintiff
48 has owned and operated since 1872 by the use of water supplemented since 1891 by steam power.

There is a building on a portion of the above-described land at the dam in question, built during the construction of said dam and in connection therewith, and so constructed that there can be installed therein four similar units of power, only one of which said units of power has in fact been already installed.

The unit of power which has been actually installed as above stated consists of a set of four horizontal Hercules water wheels which can be operated by the water raised by said dam, attached to a common shaft and driving a single generator and exciter. The water discharged from these wheels in their operation is conveyed through draught tubes from the said wheels into the tail race, discharging into said river. All the electrical power which can be generated by means of said unit already installed can be transmitted to and used in working the present machinery in said cotton mill, provided additional motor or motors shall be installed at said mill, and provided the plaintiff shall cease to use at said mill a like amount of other power heretofore used for working it with its then and present machinery equipment. In fact, electrical power generated by means of said unit has been and is now transmitted to and used in working portions of said mill as is hereinafter more particularly stated.

The building aforesaid is so constructed that three similar units of power and generators can be installed therein and power varying up to and not more than 1248 horse-power net on the main shaft of said cotton mill in the months when there is water sufficient to supply the full capacity of all the wheels of said three units under 18 feet head can be generated by said three units under said head and can be used in working the plaintiff's said cotton mill with its present equipment as aforesaid, provided additional motors shall be installed at said mill and provided the plaintiff, if it uses said total of 1248 horse-power, shall cease to use at said mill a like amount of other steam, water and electrical power heretofore used for working said mill with its then and present machinery equipment.

Each of said four units if installed can be operated as aforesaid by water raised by the plaintiff's said dam whenever there is sufficient water for said operation. Said unit already installed is capable of producing 488 horse-power on its water-wheel shaft when there is sufficient water to operate it under a net head of 18 feet at full gate. And each of the other units if installed will produce 488 additional

horse-power on its water-wheel shaft under the same conditions. With a head of 18.56 feet the power developed by each of said units would be increased. The defendant, however, does not admit a head of more than 18 feet.

In the five wettest months of the average year the average
49 total net twenty-four hours' flow is sufficient to operate under a net head of 18 feet said four units, if installed and operated at their full capacity, which capacity is at most 1952 horse-power on the water-wheel shafts.

An increase by flash boards in the head of the same quantity of water at plaintiff's dam would cause a corresponding increase in the water power developed thereby.

The plaintiff's dam with a flash board a foot high and its appurtenances and connections, such as raceways, gates and building for the installation of water wheels and generators, and the transmission lines and all the mechanisms for the full utilization of the power of one of said units, were completed and installed on the 1st day of July, A. D. 1901 (with the exception of additional motor or motors which would be necessary for the full utilization of said power of said unit at said mill), and the waters of said river were then raised by said dam, and one of said units of power capable of producing 488 horse-power on the water wheel shaft, when the water wheels of said unit are operated under a net head of 18 feet, with full gate opening, was then connected with a generator and other electrical apparatus having a capacity under the above conditions, if such additional motor or motors are installed, of 415 electrical horse-power on the main shaft at its said mill, and then on said first day of July, A. D. 1901, and thence to the present time said waters have been continuously held back and kept raised by said dam, and said set of wheels of said unit have been continuously operated by said water power, and said generator and electrical machinery have been continuously driven by said water wheels of said unit, and said electrical power thereby generated has been continuously transmitted to the plaintiff's cotton mill and used in working substantial portions of the plaintiff's said cotton mill to the extent of 350 horse-power, on the motor shaft, excepting Sundays, holidays, nights and also occasions between October 16, 1901, and May 6, 1902, when the waters of said river below the plaintiff's dam were raised and set back by the defendant's dam and the working of said water wheels of the plaintiff, as aforesaid, thereby interfered with. These were occasions of heavy rains when the waste gates of the defendant's dam, which are located at the bottom of the dam, although open, were inadequate to discharge the flow of the river.

In the operation of said water wheels of the defendant installed as hereinafter stated for the production of power, and also in the operation thereof, together with the operation of such additional wheels as may be hereafter installed by the defendant, as hereinafter stated, the defendant's dam will under ordinary conditions so raise the waters of the stream as to materially reduce the head of

water created by the plaintiff's dam, and materially interfere with the working of the water wheels of said unit installed by the plaintiff as aforesaid, and materially diminish the power developed by said wheels of said unit and the electrical power generated by means thereof and used in working said portions of said mills as aforesaid, the amount of such reduction, interference and diminution depending upon the height to which the water is so set back, and so as to materially interfere with the working of the water wheels of said additional three units of power if installed by the plaintiff as aforesaid, and materially diminish the power developed by said wheels of said additional three units and the electrical power which may be generated by means thereof, the amount of such reduction, interference and diminution depending upon the height to which the water is so set back; and so as to cause the waters of said stream to flow a certain portion of the land described in a deed from Edwin D. Metcalf to the Ludlow Cordage Company to be introduced in evidence; and so as to set back the waters of said river on the land described in said deed lying between the westerly boundary of the plaintiff's land below its dam and the westerly boundary of the Sprague lot to an elevation substantially in excess of the elevation of the copper bolt which has been agreed on as 259.73 or 259.86 feet, the amount of such excess depending upon the height to which the water is so set back and being 12.88 feet when said waters are raised to the level of the crest of the defendant's dam; and so as to cause the waters of said stream to flow certain land of the plaintiff which lies below its said dam between said dam and the westerly boundary line of the plaintiff's land, and which was not flowed prior to the erection of the defendant's said dam; (said land which will be so flowed consists of a strip on the northerly side of said river about 100 feet in length and extending along the river and varying in width from 30 feet to 70 feet, and a strip on the southerly side of said river about 115 feet in length along the river and averaging in width about 30 feet).

The first described strip of land is a portion of the tract of land conveyed by said Metcalf to the Otis Company by deed, Exhibit 4, and the second described strip of land is a portion of the tract described in deed from Shearer to the Otis Company, Exhibit 5.

All the plaintiff's dam is built on a portion of each of said tracts excepting that portion which was built on land described in deeds from Honorah Dunn to Otis Company, Exhibits 7 and 8.

At certain times in the year, if the canal gates and waste gates of defendant's dam shall both be open, such reduction, interference and diminution will occur, and, in fact, on occasions hereinafter referred to on and subsequent to March 8, 1902, when the canal gates of such dam have been opened for the purpose of operating the defendant's said mill, and when said mill has been operated by power obtained from the waters raised by its said dam, such reduction, interference and diminution have occurred. The gross head remaining at the plaintiff's dam without flash boards when the water is raised by the

defendant's dam to the level of its crest will be 5.68 feet, but such head can be increased by the use of flash boards on the plaintiff's dam, such increase corresponding to the height of such flash boards.

The plaintiff's dam does not flow any land of the defendant.

51 Ludlow Manufacturing Company's Dam.

Mean elevation of crest of defendant's dam	272.61	feet.
Height of dam from top of apron	51	"
Ordinary net working head of water	50	"
Elevation of bottom of gate opening into canal which feeds the wheels	260.61	"
Length of defendant's dam	880	"
Length of rollway of defendant's dam is	300	"

Defendant's dam is built on land purchased by it in 1891 across the Chicopee river and is about two miles below the plaintiff's dam.

There is a building on a portion of the above-described land built during the construction of the said dam, and in connection therewith, so constructed that there can be installed therein four large similar units of power, two of which units were, in fact, installed in October, 1901, and two smaller similar units of power, one of which was, in fact, installed at the same time that the two units aforesaid were installed. Each of said large units actually installed, as above stated, consists of a set of two main horizontal Hercules water wheels with auxiliary exciter wheels, all of which can be operated by the water when raised by defendant's said dam. The smaller unit installed, as above stated, consists of a set of two smaller horizontal Hercules water wheels.

These three units already installed can be used to drive three generators already installed, from which electrical power can be transmitted to and used in working entire the defendant's new mill hereinafter referred to about four miles below defendant's said dam, which mill requires for its full machinery equipment about 3,000 horse-power for its full operation, and the balance of 179 horse-power can be used to work portions of said defendant's other mills previously erected upon said river about four miles below the said dam, which said other mills have heretofore been operated by water power supplemented by steam power, and in fact said power derived and transmitted from said three units has been so used on and subsequent to March 8, 1902. The amount of said power, however, so actually used at said new mill of the defendant being about 285 horse-power, which was sufficient to operate the then and present machinery equipment of said new mill and the balance 2894 horse-power has been used to operate portions of the said other mills of said defendant, on and subsequent to March 8, 1902. The said balances of power used as aforesaid were in place of a corresponding amount of other power theretofore and now used in operating said

other portions of the defendant's other mills, with their then and present machinery equipment. Provided the defendant shall cease to use at its said other mills the said water power and supplemental steam power heretofore used to operate the then and present machinery equipment thereof, the power derived from the
52 operation of all said six units can be utilized by the defendant for the operation of its said then and present machinery equipment of its said other mills; there being, however, occasions during the wettest months of an average year when the full power that can be derived from said six units will exceed the requirements of the equipment aforesaid, and other occasions during the dryest months of an average year when the power so derived will not be sufficient for the requirements aforesaid. If said other mills of the defendant are fully equipped with machinery, and in full operation, then there will be needed 717 horse-power in addition to the said 3000 horse-power required as aforesaid for said new mill, and also in addition to all other power heretofore and now utilized for the working of said mills of said defendant.

The three units already installed are capable of producing 3740 horse-power on the wheel shafts, or 3179 horse-power on the main shafts, when there is sufficient water to operate them at full head and full gate, and the three additional units will produce a like amount of additional horse-power under the same conditions.

The average total net twenty-four hour flow of the dryest month of the average year with a net head of 50 feet would give at the defendant's dam 1438.95 horse-power on the wheel shafts.

The average total net twenty-four hour flow of the dryest month of the average year if used in ten hours with the same head would give at the defendant's dam 3453.48 horse-power on the wheel shafts.

In the five wettest months of an average year the least net twenty-four hour flow would give at the defendant's dam under a net head of fifty feet at least 5485.80 horse-power on the wheel shafts if all said units were installed.

The Ludlow Manufacturing Company, having become the owner in fee in 1891 of certain land which comprehends the site of its present mill dam, the accompanying development, and the structures hereinafter referred to, employed an engineer, in the spring and summer of 1894, and again in the spring and summer of 1898, to take levels and make surveys, plans and soundings along and upon the property, thus acquired for the purpose of determining whether or not it was practicable to erect a mill dam in the position and upon the site of the mill dam since completed, and immediately after said employment he proceeded to do and did the work comprehended thereby.

Subsequently, in the year 1898, but prior to October, 1898, at the request of the Ludlow Manufacturing Company, the president and the other officials of the Boston & Albany Railroad Company met the officials of the Ludlow Manufacturing Company at Red Bridge,

and there, at the request of the Ludlow Manufacturing Company, determined that the location of the Boston & Albany tracks at that point should be changed so that the erection of a dam at the site of the present so-called Red Bridge dam of the Ludlow Manu-
53 facturing Company should not flood the tracks of said railroad and that said tracks were so changed in accordance with such determination.

The Ludlow Manufacturing Company had then determined to erect a dam on said site, but had not then determined on the height thereof.

In January, 1899, the Ludlow Manufacturing Company employed one Ball, a civil and hydraulic engineer of experience. The contract of said Ball's hiring was as follows, to wit:—

That the Ludlow Manufacturing Company had determined to erect a mill dam at Red Bridge upon the site and the location of the mill dam which was subsequently erected by said company; that he was to proceed immediately to make surveys, cross sections, soundings, plans and estimates necessary for the erection in a completed form on said location of said mill dam, together with raceways, canals, buildings and other structures, and to do such other acts and things as would be necessary for the proper development of the water power on said mill site.

Immediately thereafter, said defendant having determined upon the present height and present site of said dam, said Ball and the agents and employees of the defendant duly authorized, commenced the work of preparation for the building of defendant's said dam and said structures and making said development, and prosecuted said work of preparation for, and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time.

Said mill dam and its appurtenances, said development and said connections, such as raceways, gates and building for installation of water wheels and the genrators and transmission lines, and all the mechanism for the utilization of said power, were completed and installed on and not before October 16, 1901, with the exception of the three said additional units of power which have not yet been installed, but at no time prior to the 16th day of October, 1901, was the construction of the defendant's dam sufficiently advanced to close its waste gates or to raise the waters of the stream so as to flow the plaintiff's land, or diminish the head of water created by the plaintiff's dam, or interfere with the operation of said water wheels of the plaintiff installed as aforesaid.

The defendant's expenditure for such power development was a sum aggregating $800,000 exclusive of the cost of the said new mill and its present equipment. And the plaintiff's expenditure for its power development was a sum aggregating $271,000.

The Ludlow Manufacturing Company on the 3d day of August, A. D. 1899, began it, said dam by commencing the construction of

the tail race thereof and within a reasonable time after the said employment of said Ball and commencement of said work by said Ball and said agents and employees as aforesaid, and within a
54 resonable time after making its beginning of its said dam as aforesaid, completed said dam, said buildings constructed as aforesaid, for the installation of said water wheels and generators, and said development, and also said transmission lines, and said mechanisms hereinbefore referred to, and, within a reasonable time after the employment of said Ball and said agents and employees as aforesaid and after making its said beginning as aforesaid, and before the completion as aforesaid, completed a new mill on said river about four miles below its said dam and in the vicinity of other mills of the Ludlow Manufacturing Company also on the same stream, for the working of which mill so completed and its other mills on the same stream, which other mills had been theretofore constructed, it can apply and use as aforesaid the waters of said river, if raised by its said dam, by generating, transmitting, and using electrical power, and has so applied and used them temporarily on and subsequent to March 8, 1902, and not before, on occasions of and after heavy rains when the waste gates of its dam were inadequate to discharge the flow of the river, and on October 16, 1901, the date of the completion of said dam as aforesaid, would have closed its waste gates and kept open its canal gates and would have continuously so applied and used said waters for the operation of its aforesaid mills from the said date of the completion of said dam but for the pendency of this suit and the action of the court therein, a copy of which action is hereto annexed marked " X," and the agreement of parties made October 15, 1901, whereby it was provided on the part of the defendant that it would not close its waste gates and on the part of the plaintiff that it would not apply for an injunction without notice by each respectively to the other of forty-eight hours of its intention so to do, which agreement was to be without advantage to the plaintiff and without prejudice to the rights of the defendant. By reason of this suit and said action and agreement, the Ludlow Manufacturing Company has not closed said waste gates since the said date of the completion of the dam. The Ludlow Manufacturing Company used all due diligence in completing its said dam on the aforesaid date, and the fact that it was not completed at an earlier date and that the waters of the stream were not raised thereby at an earlier date was not due to any negligence or laches on the part of the defendant. The waste gates of both dams are at the bottom thereof respectively. The defendant's said dam can also be, and in fact on the aforesaid occasions on and subsequent to October 16, 1901, was used for water storage purposes by said defendant for its aforesaid mills.

The bottom of the canal of the defendant at its canal gates is from seven and one half to ten inches higher than the surface of the water of the tail race at plaintiff's dam when the plaintiff's wheels are running. The defendant's said canal is constructed of solid

masonry and concrete and the water from said canal is conducted through penstocks to and upon the wheels of the defendant
55 and thence through draft tubes to the tail race of defendant, discharging into said river. On the 4th day of April, 1900, the plaintiff determined to build a dam at the site of its present dam and then began its preparatory work therefor and prosecuted the same with due diligence until the 11th day of August, 1900, when it began the work of excavating for the foundations of its said dam, and from said latter date continuously it prosecuted the work with due diligence to the completion within a reasonable time of its aforesaid dam, said building constructed as aforesaid for the installation of said water wheels, and the generators and the said development and also the said transmission lines and the mechanisms hereinbefore referred to.

With the waters of the river raised to the crest of the plaintiff's dam as built, without the flash boards (elevation 278.29 feet), the plaintiff's dam will flow the plaintiff's land and a portion of the land formerly comprehended by the highway which was discontinued by the county commissioners on petition, the record of which has been introduced in evidence, Exhibit 14, which latter land is described in Exhibits 7 and 8, and at that elevation will flow no other land. If the said waters are raised above the crest of the plaintiff's dam three inches, it will flow in addition a strip of land of the Boston & Albany railroad, and if raised to the elevation 279.29 feet, it will flow said strip of land seventy feet along the river a maximum width of three feet. With the water raised by the dam to an elevation of 281.29 it will flow the said railroad's land for a distance along the river of two hundred and fifty feet, and a maximum width of fifteen feet.

The Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam.

The plaintiff completed its said dam before the Ludlow Manufacturing Company completed its said dam.

The plaintiff raised the waters of said river, by its said dam as aforesaid, and used them in working the water wheels of said unit as aforesaid, and by electrical power generated and transmitted as aforesaid, worked said portions of its said cotton mill as hereinbefore stated before the completion of the defendant's said dam and before the waters of said river were raised by the defendant's said dam.

The petitions to the county commissioners of Hampden county filed by the respective parties relative to them respectively, and the plans and specifications filed by them respectively and the action of the said county commissioners thereon and the entire record of the county commissioners concerning the same, may be introduced in

evidence, and each of said parties may also introduce in evidence competent testimony concerning the same, but neither of the
56 said parties is precluded from making the claim that the said plans and specifications so filed, and said action and record or any part thereof, are conclusive.

The defendant, wherever referred to herein, means The Ludlow Manufacturing Company; and wherever the words "party" or "parties" are used as designating a defendant, The Ludlow Manufacturing Company is thereby meant.

Each party may introduce in evidence plans, maps and photographs descriptive of their respective developments.

Neither party is hereby precluded from introducing all competent evidence upon any feature of the case not covered by this stipulation.

X.

"This cause came on to be heard October 31, 1901, upon an application by the plaintiff for a preliminary restraining order as prayed in the bill, and thereupon, the defendant's attorney stating that the waste gates in the Ludlow Manufacturing Company's dam have not been closed, or if closed, shall be opened, and shall not again be closed without giving the plaintiff forty-eight hours' notice thereof, no restraining order is made at this time, this order being made without prejudice in any way to the rights of either the plaintiff to further apply for such restraining order or of the defendant to oppose the granting of the same.

By Plaintiff's Attorneys, C. L. GARDNER.
B. B. JONES.
By Defendants' Attorneys, WALTER S. ROBINSON.
JAS. B. CARROLL.
WILLIAM H. BROOKS."

At the date of the filing of its bill in this cause, the plaintiff was the owner of the real estate therein described, and was, and for a long time had been, operating a mill thereon, and in this mill had been carried on the business of manufacturing cotton fabrics. The plaintiff also had a dam at this cotton mill. This mill was about three quarters of a mile above the site of the plaintiff's lower dam named in the bill, on the Chicopee river. The real estate then owned by the plaintiff comprised all the land flowed by this dam herein called the lower dam. The defendant Ludlow Manufacturing Company, at the same time owned the land on which it was then erecting its dam mentioned in the plaintiff's bill, and all land above this dam on the river, and which was flowed by it, except a small piece, and except also the land conveyed to the Ludlow Cord-
age Company, by Edwin D. Metcalf, December 3, 1898, and
57 certain lands of the plaintiff specified in the said stipulation between the parties. The Ludlow Manufacturing Company also owned other lands below this dam on the stream and elsewhere

in Ludlow, and owned and operated a mill thereon, in which it carried on the business of manufacturing fabrics from hemp and sisal. This mill of the Ludlow Manufacturing Company was between four and five miles down stream from its dam then in process of erection, viz.: the Red Bridge dam. The Ludlow Manufacturing Company also had a dam at the site of this mill. The Red Bridge dam was nearly two miles down the stream from the plaintiff's lower dam, but was not placed on land at any time owned by the plaintiff or by said Metcalf. The defendant Ludlow Cordage Company owned no land, mill or dam, unless the tract conveyed to it by Metcalf, December 3, 1898, was owned by it. It was a tenant of the Ludlow Manufacturing Company, occupying a portion of one of the mill buildings of that company, and paying rent therefor. It manufactured cordage from hemp and sisal and required and used in this business from 250 to 275 horse-power, which it hired of the Ludlow Manufacturing Company. The Ludlow Cordage Company was organized and began business in February, 1893. It began in a small way, and increased its business from year to year. The Ludlow Manufacturing Company and the Ludlow Cordage Company were each corporations having a distinct corporate existence. On September 26, 1882, the plaintiff was operating its cotton mill, and owned the entire south bank of the river from this mill to the Shearer lot, which is marked No. 7 on the plan dated February, 1902, hereinafter mentioned, and Metcalf owned the south bank below the Shearer lot, called the Sprague lot, and marked on said plan "Metcalf privilege," and at that time The Otis Company, the plaintiff, owned the north bank, being lot No. 1 on said plan extending from said dam to the Barker lot, No. 5 on said plan, and Metcalf owned the north bank just below the Barker lot, called the Green lot; the Otis Company at the same time owned to the thread of the stream on both sides between its upper mill dam and the Barker lot, and owned to the thread of the stream on the south side of the river between lot No. 1 and the lower line of the Barker lot, and from the lower line of the Barker lot to the Shearer lot the Otis Company owned to the thread of the stream on both sides, but did not own the bank on the north side of the river, and it did not then own the land conveyed to it by Honorah A. Dunn, on a part of which a portion of its lower dam is erected. This Dunn land was conveyed to the plaintiff by two deeds, which were dated March 2, 1901. These deeds were given subsequent to the beginning of the construction of the plaintiff's lower dam.

The plan of land of Otis Company on Chicopee river, dated February, 1902, by J. K. Barker, engineer, and used at the hearing before me, may be referred to.

The plaintiff contended that an agreement of September 26, 1882, between it and Edwin D. Metcalf, who was then the owner of
58 the land conveyed by deed, in which the Ludlow Cordage Company was named as grantee, which agreement and deed are herein recited, precluded the Ludlow Manufacturing Company

from building and maintaining a dam at the present site of its present dam at Red Bridge, which would raise the waters of the stream to a greater height than that prescribed by the sixth clause of said agreement, and offered evidence, hereinafter set forth, for the purpose of showing that the deed to the Ludlow Cordage Company was colorable, that the Metcalf property was really purchased by the Ludlow Manufacturing Company for its own purpose, and that the Ludlow Manufacturing Company is equitably the owner of said land.

This evidence was objected to by the defendant, and it seemed to me immaterial in view of rulings of law hereinafter set out. If, however, said rulings of law are incorrect, then I find as follows, to wit:—

Said dam does raise the waters of the stream to a greater height than that prescribed by said sixth clause of the Metcalf agreement.

On September 26, 1882, the plaintiff and Edwin D. Metcalf executed and delivered to each other an agreement in writing, not under seal and not acknowledged or recorded, of which the following is a copy:

(Copy.)

Memorandum of agreement made this 26th day of September, A. D. 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business in Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Massachusetts, both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

First. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river & extending back therefrom situate in said Palmer and known as the Shearer property as soon as reasonably may be and at such price as the parties hereto may mutually agree upon.

Second. As soon as said real estate is so purchased said company agrees to convey to said Metcalf, in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

Third. Said Metcalf agrees to then convey to said company, in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river, which lies above a point in range with said stake.

Fourth. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any reasonable manner do anything to interfere with such purchase and said property, and no part thereof shall be pur-
50 chased by either of said parties or any one in their behalf, except in pursuance of this agreement.

Fifth. Until such purchase shall be consummated, all work in the

way of developing and improving these respective water powers on said river below Three Rivers thall be wholly suspended by the parties hereto.

Sixth. Said Metcalf or his assigns shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

Seventh. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto unless said company shall fail to purchase said Shearer property within six months from the date hereof, but, in the event of such failure, these presents shall become null and void at the expiration of said period, and whatever rights if any under the mill act or otherwise either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

Witness our hands the day and year first above written.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

Executed in presence of
CHARLES L. GARDNER.

The fall of the river between the surface of the water in the plaintiff's tail race at the upper mill and the lower boundary of Metcalf's land, to wit, of the Sprague lot, was 40.97 feet, and from the surface of said tail race water to the stake mentioned in the second article of the agreement between Metcalf and the plaintiff hereinbefore set forth, the fall was 19.65 feet, and from said stake to the lower boundary of the Shearer lot the fall was 21.32 feet.

In pursuance of the agreement between the Otis Co. and Metcalf, the Otis Co. purchased and acquired title by deed duly executed and recorded to the Shearer lot, which is the Shearer property mentioned in said agreement, and conveyed to said Metcalf by deed dated March 14, 1883, recorded March 22, 1883, the portion of said Shearer lot lying below said stake mentioned in the 2d article of said agreement, and Metcalf, by deed dated March 14, recorded March 23, 1883, conveyed to the Otis Co., in pursuance of said agreement, all that portion of the Green property mentioned in
60 the 3d article of said agreement on the opposite side of said river lying above a point in range with said stake, the same being lot No. 6 on said plan, dated February, 1902.

On the 9th day of May, A. D. 1883, the Otis Co., by deed of that date, recorded May 25, 1883, acquired title to the Barker lot and to the thread of the stream on the northerly side of the river between lot No. 1 and the lower line of the Barker lot.

The deeds from the Otis Co. to Metcalf, and from Metcalf to the

Otis Co., are respect*fully* as follows, and were delivered upon the dates of the respective acknowledgments thereof:—

"*Know all men by these presents*, that the Otis Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, in consideration of one dollar to it paid by Edwin D. Metcalf, of Springfield, in the county of Hampden and Commonwealth aforesaid, the receipt whereof is hereby acknowledged hereby remises, releases and forever quitclaims unto the said Metcalf, his heirs and assignees, a certain tract or parcel of land, situate in Palmer, in said county of Hampden, on the northerly side of the highway leading from Three Rivers to Springfield, and about one mile westerly from said Three Rivers, bounded and described as follows: Beginning at a point in the Chicopee river on the northeasterly line of grantor's land, N. 61½° E., of a copper bolt set in a rock on or near the southwesterly bank of said river, about two hundred and fifteen feet below the mouth of a brook, being the southwesterly corner of land this day conveyed by the grantee to the grantor. Thence S. 61½° W. to said copper bolt. Thence in the same direction eighty and one half feet to an iron bolt with a ring in it set in a rock in the bank wall, on the northeasterly side of said highway. Thence bounded southerly by said highway, westerly by land of one Talmadge and a road leading from said highway past the house of said Talmadge, and northerly and northeasterly by land of the grantee and by said river to the place of beginning; said northerly and northeasterly line supposed to be the southerly and southwesterly line of grantee's land, containing about twenty-eight acres, more or less, with the privileges and appurtenances thereto belonging.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said Metcalf, and his heirs and assigns, to their own use and behoof forever. And said corporation hereby covenants with the grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by it, and that it will warrant and defend the same to the grantee, and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under it, but against none other.

In witness whereof, the said Otis Company has caused its corporate seal to be hereto affixed and these presents to be signed
61 in its name and behalf by George F. Fabyan, its treasurer, this fourteenth day of March, in the year one thousand eight hundred and eighty-three.

OTIS COMPANY, [L. S.]
By GEO. F. FABYAN, Treasurer.

Signed and sealed in presence of
A. L. RICHARDSON.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

BOSTON, March 17, 1883.

Then personally appeared the above-named Geo. F. Fabyan and acknowledged the foregoing instrument to be the free act and deed of the Otis Co.

Before me,

ALBERT L. RICHARDSON.
Justice of the Peace."

"*Know all men by these presents*, that I, Edwin D. Metcalf, of Springfield, in the county of Hampden, and State of Massachusetts, in consideration of one dollar paid by the Otis Company, a corporation duly established under the laws of said State, the receipt whereof is hereby acknowledged, do hereby release, remise and forever quitclaim unto the said Otis Company a certain tract or parcel of land situated in Palmer, in said county of Hampden bounded and described as follows: Beginning at a point in the Chicopee river, on the southwesterly line of grantor's land S. 61½° W. of an iron bolt with a ring in it, set in a rock about sixteen feet from the northeast bank of said river; thence N. 61½° E. to said iron bolt; thence in the same direction ninety-six and one half feet to another iron bolt, with a ring in it, set in a rock; thence in the same direction about eighty feet to land of the Boston and Albany Railroad Company; thence bounded northeasterly by land of said railroad company; thence bounded southeasterly by land of Franklin Barker; thence bounded southwesterly by said river to the place of beginning, said southwesterly line supposed to be the northeasterly line of grantee's land and containing five acres, more or less.

To have and hold the granted premises, with all the privileges and appurtenances thereto belonging to the said Otis Company and its successors and assigns to their own use and behoof forever. And for the consideration aforesaid, I, Carrie W. Metcalf, wife of said Edwin D. Metcalf, do hereby release unto the said grantee and its successors and assigns all right of or to both dower and homestead in the granted premises.

62 In witness whereof, we, the said Edwin D. Metcalf and Carrie W. Metcalf, hereto set our hands and seals this fourteenth day of March, A. D. 1883.

EDWIN D. METCALF AND SEAL.
CARRIE W. METCALF AND SEAL.

Witness:
G. WELLS to E. D. M.
M. E. FLINT to C. W. M.

COMMONWEALTH OF MASSACHUSETTS, Hampden, } ss:

March 14, 1883.

Then personally appeared the above-named Edwin D. Metcalf, and acknowledged the foregoing instrument to be his free act and deed.

Before me,

GIDEON WELLS,
Justice of the Peace."

The Metcalf agreement has not been vacated or annulled by the mutual consent of the parties thereto, or in any other manner, unless such is the legal effect of the deed from Metcalf to the Otis Company and that from the Otis Company to Metcalf.

Both the plaintiff and the Ludlow Manufacturing Company had for several years prior to beginning construction of their respective dams considered the question of additional power, the need of such additional power having grown. December 15, 1891, the stockholders of the Ludlow Manufacturing Company passed the following vote, on motion of Mr. Wallace, one of its directors:—

"On motion of Mr. Wallace seconded by P. M. Weld, it was voted: That the treasurer be authorized to purchase such parcels of land, water rights, or water power on the Chicopee river as may be deemed for the best interests of this corporation, subject to the approval of the board of directors."

And by several deeds of the same date as this vote, several tracts of land were conveyed to this defendant, on a portion of which a part of the Red Bridge dam and its canals and power house are now built, but all the other lands of this corporation, connected with the development of this water power, were acquired by it from various owners on and subsequent to February, 1899. The map of the entire property of the Ludlow Manufacturing Company used at the hearing before me and marked "Exhibit 42" may be referred to. The Ludlow Manufacturing Company had increased its power from time to time by the introduction of stream engines and additional water wheels at its lower dam at its hemp mill at Ludlow, and the plaintiff had also increased its power by steam engines and additional water wheels at its upper dam at its cotton mill in Palmer.

63 The deed from Metcalf to the Ludlow Cordage Company was procured by the Ludlow Manufacturing Company. The land described therein was purchased by the Ludlow Manufacturing Co. for its own purpose, namely, the development of additional water power, and paid for with its own funds. The existence and terms of said agreement between the Otis Co. and Metcalf was at the time of procuring said deed known to the Ludlow Manufacturing Co., and this deed was taken by the Ludlow Manufacturing Co., in the name of the Ludlow Cordage Co., in part for the purpose

of concealing the true ownership of said property and of evading the obligations imposed upon Metcalf and his assigns by the 6th article of the Metcalf agreement. The Ludlow Manufacturing Co. is in equity the real owner of the said property and retains title in the name of the Ludlow Cordage Co. for the purposes above stated.

Since the last finding is an inference from a number of facts, involves the question of the authority of certain officers and agents of the Ludlow Manufacturing Company, and may be considered an inference of law, as well as of fact, and as the evidence upon which it was based was objected to by the Ludlow Manufacturing Company, I state so much of the evidence as seems to me necessary for the proper understanding of the inference, so far as it is an inference of law, and the objections made to the evidence.

The capital stock of the Ludlow Cordage Company was 1000 shares, of which all but 220 shares were owned by stockholders of the Ludlow Manufacturing Company. There were in 1898 thirty-six stockholders of the Ludlow Manufacturing Co., holding 5230 shares of a total capital of 7500 shares of the Ludlow Manufacturing Co., who were not stockholders of the Ludlow Cordage Co. Each company had five directors, and three of them, Messrs. Brooks, Wallace and Weld, were the same in each company. The Ludlow Cordage Company had the same office and the same bookkeeper in Boston, as the Ludlow Manufacturing Company. It was a tenant of the Ludlow Manufacturing Company at its mill in Ludlow. It owned no land of its own at all, ether before or since the Metcalf conveyance of December 3, 1898, unless the land conveyed to it by Metcalf is owned by it. It then needed and was using power to the extent of 250 to 275 horse-power and its present needs and use of power are substantially the same. Such power has always been furnished by the Ludlow Manufacturing Co., and neither company contemplated that the Ludlow Manufacturing Co. would cease to furnish such power, though Wallace and Stevens for several years beginning in 1894 had considered the advisability of the purchase of the Metcalf tract by the Ludlow Cordage Co., and they and Hubbard spent several hours in 1894 in examining that tract.

The natural fall of the stream on the land conveyed by Metcalf by the deed of December 3, 1898, would develop from 1000 to 1500 horse-power, and the Ludlow Cordage Company never took any steps to develop a water power.

64 The negotiations for the purchase from Metcalf were conducted by one John E. Stevens, then the manufacturing agent at Ludlow, of the Ludlow Manufacturing Company, in the name of the Ludlow Manufacturing Company, with the knowledge of Hubbard, its treasurer and one of its directors, and with the knowledge of Wallace, its selling agent and one of its directors.

These negotiations were conducted by letter, by personal interview and by telephone. The purchase was agreed upon by Stevens and Metcalf on November 21, 1898. On the same date Stevens, at

Ludlow, notified Hubbard and Wallace in Boston by telephone of this agreement for purchase, and they both assented thereto.

On the same date, to wit, November 21, 1898, Metcalf wrote two letters to the Ludlow Manufacturing Company, one addressed to Ludlow, and one to Boston, stating in each that he had sold the property to the Ludlow Manufacturing Company. Both letters were acknowledged by letters written November 22, 1898, one by John E. Stevens, in the name of the Ludlow Manufacturing Company, at Ludlow, and one by Hubbard, at Boston.

These and other letters from Metclalf to the Ludlow Manufacturing Company and from the Ludlow Manufacturing Company to Metcalf were introduced in evidence, and the following exhibits numbered 24, 25, 26, 27, 29, 31, 28, 39, 46, 32, 34, 33, 40, 35, 36, 44, are copies thereof:—

EXHIBIT No. 24.

Ludlow Manufacturing Company,

LUDLOW, MASS., July 9th, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: We are advised that you desire to sell your property on Chicopee river near Three Rivers. If this is so, kindly advise us what is the lowest cash price you care to consider; we might be interested in the property at a price.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 25.

JULY 15, 1898.

Ludlow Manufacturing Company, Ludlow, Mass.

GENTLEMEN: Your esteemed favor of July 9th was duly received during my absence, and in reply will say that I purchased the property to build a mill, but became engaged in business here and, therefore, would be willing to sell it for a satisfactory price.

65 I did sell the same two or three years ago for $20,000 for a paper mill, but hard times coming on in the paper industry just then broke up the sale. There is about forty acres of land on both sides of the river, and I hold an agreement with the Three Rivers Manufacturing Company as to the rights I have, which is about twenty-one feet fall. This, of course, gives a large power. I did have plans drawn for a dam across a point where it can be built very cheaply and easily. If the subject interests you, I could meet any of your people in Boston this summer, as I shall spend a portion of the summer, at least, at my house at Martha's Vineyard.

Awaiting your reply, I am,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 26.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 12th, 1898.

Mr. Edwin D. Metcalf, Auburn, N. Y.

DEAR SIR: Your favor dated 15th of July came duly to hand. We have now definitely decided to increase our power plant, either by steam, or water with electric transmission, or by re-locating heavy branches of our business at tide water.

Our plans and figures for first proposition are well along, and we have now reached a point where it would interest us to learn the lowest cash price you are willing to consider for your property next Otis Co. If you will write us, stating price, giving us an option far say one month, so that we may make survey and estimates of cost to develop the property, your figures will be considered absolutely confidential; or if you prefer to have an interview, either our treasurer, Mr. Hubbard, or myself, or both of us, can arrange to meet you, say at Springfield, or Boston, if you are likely to be there.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 27.

OCT. 13, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: Your esteemed favor of Oct. 12th has been duly received, and in reply will say that I expect to be in New York at the Cordage Manufacturers Association, 46 South St., Oct. 20th. As you are in the cordage business, will not some representative of your company be present at that meeting. If so, I should be
66 pleased to go over the question of the sale of my property and water power in Palmer, as matters of that kind can be discussed much better personally than by correspondence.

Messrs. Tower and Brother, the engineers at Holyoke, Mass., surveyed this thoroughly and drew plans for its improvement, and could give you full details as to that. I can send you a copy of the agreement between Otis Manuf. Co. and myself, if you desire, but it is agreed between us that there is between 20 and 21 feet of fall belonging to this property of mine.

Kindly advise me if some one representing your company is expecting to be in New York about that time, and oblige,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 29.

OCT. 14, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: That you may know just what my property in Palmer is and what rights I have, I will send you memorandum of deeds and a copy of agreement between Otis Co. and myself.

The first deed on the south side of the river was from Z. Chafee, trustee for A. & W. Sprague Manuf. Co., dated July 31st, 1882, and recorded in Book 390, page 35.

The next was from George D. Green and wife, dated Aug. 19th, 1882, and recorded in Book 389, page 182.

The next from the Otis Co., dated March 22d, 1883, recorded in Book 393, page 467.

A small portion of the land I purchased from George D. Green I transferred to the Otis Co. at the same time that they transferred to me the large piece of land which surrounded the original purchase made from Mr. Chafee. In all there must be somewhere in the neighborhood of 40 acres of land between the Boston & Albany R. R. tracks on the north side of the river and the main road from Three Rivers to Springfield on the south side.

Also enclosed find copy of memorandum of agreement entered into between the Otis Co. and myself in regard to division of rights in the river. At one time we were competing for the purchase of one piece of property, and we decided to pool our issues and come to an understanding as to our respective rights. You will see by this that the total fall is estimated at 40.97 ft., of which the Otis Co. own 19.65 and I 21.32. The fall was carefully surveyed by
67 two different engineers, one representing them and one representing me, and I have no reason to doubt but what it will be found to be correct.

Tower Brothers, engineers at Holyoke, surveyed this some five years ago, and cross-sectioned the whole territory in that neighborhood with a view of knowing how to develop the power most economically. They had an option on the water power at that time for a certain period at $20,000, which I have always considered the property worth. However, I am prepared to waive that and would name a better figure than that if your people were in earnest and desired to purchase.

In regard to payment, would say that any payment which your people might wish to make would be entirely satisfactory to me, either long or short time—of course, the same being upon interest.

As your company is interested in cordage and I am also, I hope that either Mr. Stevens or Mr. Hubbard will arrange to be in New York on the 20th, at which time the cordage interests are to meet in regard to the continuance of the present understanding between them. The meeting is to be at 46 South street. I should really like to talk with your people in regard to naming prices for twine; we

are refusing to name any price at the present time, pending a settlement of the price of fibre, and think that if no one would name prices absolutely until March 1st, it would be better and a safer business would be done.

We could accept orders subject to fixing of price March 1st. That is quite often done in our business.

Yours truly, EDWIN D. METCALF.

EXHIBIT No. 31.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 17, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: I have your two favors dated 13th and 14th inst., and note carefully all you write. I am greatly obliged for the description of your Palmer property. I didn't know about the bounds or size thereof, nor of your agreement with the Otis Co. I have never discussed the subject with them. Mr. Geo. D. Green, who is a near neighbor, has spoken to me of the property, and thought you might wish to dispose of it.

I may state that we are very decidedly in earnest about adding to our power. This, indeed, is a necessity, and we should not think of considering anything below 1000 horse-power. The provisional plans we have made for development by steam are, indeed, for 1500 horse-power. We are not at all agreed as between steam and water, and a decision on this point will only be reached after our plans are completed.

68 You, of course, are well aware that great strides have been made in the development of power from coal. I know one large concern in the western part of this State which claims to produce a horse-power for figures that seem fabulous. There is also this to be said, that the cost of installing steam power can always be estimated with reasonable exactness. On the other hand, I have faith in really good water powers when cost of development is not extreme. How this may be in your Palmer property, we do not yet know. My idea is that if we get a favorable option from you, we can put an engineer on the property and know inside two or three weeks just what we can do. I feel warranted in saying that if the figures which result from our examination of the property are favorable, there is every probability that we shall become purchasers. Of course I do not know whether you are anxious to sell the property or indifferent about it, and naturally that will influence your ideas of value.

I am trying to explain our position as frankly as words will do it. You will please not understand it as designed to influence your views, but I am desirous, so far as you can meet me, to make the presentation of installation by water as favorable as possible as against steam power, which is preferred by some interested with us.

I quite agree with you that with an exchange of views, we would make progress much more rapidly than by writing, and if an interview can be arranged, that will be best. I hope something may come of it, and if not, no harm will be done.

Mr. Hubbard, our treasurer, is just now in New Hampshire, and I do not expect him back before the 20th inst. There is a chance that I may be in New York on the 19th late or on the morning of the 20th. If I am there, it would be at the Hotel Manhattan. I should feel obliged if you would inform me by return mail if you could see me there as early as 8 o'clock in the morning of the 20th. I am obliged to be back here on the afternoon of that day. Also advise me your address in New York, so that I can wire you there if my plans are changed.

In the matter of cordage, I note all you say. The points raised are exclusively in the hands of Mr. Wallace, who is treasurer of our cordage Co. From what I know of his plans I do not think he expects to be in New York this week. I shall probably see him, however, on Saturday and will convey what you write. My impression is very strong that he is entirely averse to making any prices on binder twine at present.

Sisal is an enigma, and I do not think any living person knows what it will be worth next March. The excessively big jumps in prices for sisal and manila make the cordage business exceedingly difficult for all concerned.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

69 EXHIBIT No. 28.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 19th, 1898.

E. D. Metcalf, Esq., Adams house, Boston, Mass.

DEAR SIR: Your day message reading as follows: "Shall be in Boston to-morrow forenoon. Address, Adams house," duly received. It will be very convenient for us to see you in Boston, and I expect to call at the Adams house about 10.15 a. m.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 39.

Nov. 21, 1898.

Ludlow Manuf. Co., Boston, Mass.

GENTLEMEN: Agreeable to my conversation this morning with Mr. Stevens over the long distance telephone, I have sold you my

water power at Palmer, Mass., for the sum of fifteen thousand dollars ($15,000) and am having deed prepared to-day, as I leave for the West to-night. I am having the same kind of deed prepared that I purchased under, but have authorized Mr. Stevens to have the title investigated at my expense. I satisfied myself fully in regard to this matter at the time of purchasing, but as I have not the written evidence, take this course.

I believe this to be the largest undeveloped water power in the State of Massachusetts, and considering the amount of power there, this is merely a nominal figure for it. Had I remained in Springfield, I should have developed it for a manufacturing business myself.

During the palmy days of the A. & W. Sprague Manuf. Co., a former manager of the Ware mills went to Providence and interviewed Mr. Sprague as to what he would sell the property for, and he placed a valuation upon it then of $75,000. This was some thirty years ago.

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 46.

Nov. 21, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: Agreeable to my conversation over the telephone with Mr. Stevens, I have this day sold you my water power in
70 the town of Palmer for the sum of fifteen thousand dollars ($15,000), and will prepare the deeds to-day, as I expect to leave for the West to-night. With the deeds, I will send you my deeds, that you may investigate the matter, and think that I will send them direct to your office, as there will have to be titles looked up at Springfield. I am having deed drawn to you of the same character of the deed drawn to me, that is quitclaim, but as I should furnish you evidence that title is all right, you may have the title investigated, and a bill sent to me for this investigation, which I will pay.

Trusting that this will be satisfactory, I am,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 32.

Nov. 21, 1898.

Ludlow Manuf. Co, Ludlow, Mass.

GENTLEMEN: Enclosed please find deed of my water power at Palmer, Mass., which I have this day sold you, agreeable to previous letter, for $15,000; also deed from Z. Chafee, trustee, to me, deed from George D. Green to me, Otis Manuf. Co. to me, and original agreement between the Otis Co. and myself.

This deed from me to your company is delivered to you as an escrow pending your satisfying yourself as to my title. Kindly in-

vestigate the same at your earliest convenience; also kindly send me a letter acknowledging receipt of these deeds as escrow pending such investigation, and oblige,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 34.

OFFICE OF THE LUDLOW MANUF. CO.,
133 ESSEX STREET, BOSTON, Nov. 22, 1898.

Mr. Edwin D. Metcalf, Auburn, N. Y.

DEAR SIR: We have duly received your letter of November 21st, confirming sale of the water power at Palmer, negotiated with our Mr. Stevens, and in behalf of the company I hereby confirm the same, subject to title proving satisfactory, of which I have no doubt.

Yours truly, CHARLES W. HUBBARD, Treas.

71 EXHIBIT No. 33.

Ludlow Manufacturing Company.

LUDLOW, MASS., Nov. 22d, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: Your favor, dated November 21st has been duly received, together with documents as named. These will have immediate examination and I hope we shall be ready to close the business in a few days. You will meantime receive from the treasurer of this corporation confirmation of the agreement made between you and myself.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 40.

Nov. 30, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: On my return to-day, I do not find any communication from you in regard to deeds, except acknowledging receipt. As your attorney has had ample time to investigate title, kindly let me hear from you.

Yours truly, EDWIN D. METCALF.

EXHIBIT No. 35.

Ludlow Manufacturing Company.

LUDLOW, MASS., Nov. 30th, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: You would have heard from us before now, but the perfectly awful weather prevented our engineer checking up some bonds. I think, however, we are now ready to *consummate* the business, but, if possible, would like to see you about some *matters of detail*. You spoke of coming East about this time; if this is still your plan, kindly advise if you can call at our treasurer's office in Boston, or if you are coming to Springfield, that will do equally well. If your plan is changed we will try to write the points about which we desire to speak, but an interview is everyway so much more simple and satisfactory.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

72 EXHIBIT No. 36.

Ludlow Manufacturing Company.

LUDLOW, MASS., Dec. 1st, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: As just arranged with you by telephone, one of us will plan to meet you Saturday forenoon at Auburn, and I think everything can then be arranged and business settled.

Just before telephoning you, I had dictated a longer letter which it is not now necessary to mail, as a verbal exchange of views will be so much more satisfactory.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 44.

Ludlow Manufacturing Company.

LUDLOW, MASS., Dec. 6th, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: Referring to transfer of property just negotiated with you, I will feel greatly obliged if you will kindly consider the matter as confidential. We prefer that it should not be made public for the present.

Yours truly,

LUDLOW CORDAGE CO.,
By J. E. STEVENS, Ag't.

In 1898 said Stevens was a director of the Ludlow Cordage Co. He was not an officer of the Ludlow Manufacturing Co., but he was its manufacturing agent and one of three persons named by the directors of the Ludlow Manufacturing Co. in their vote of December 20, 1898, as "the management." Hubbard, the treasurer of the Ludlow Manufacturing Co., in 1898 was not a stockholder, director or other officer of the Ludlow Cordage Co.

Prior to November 22, 1898, the substance of the agreement between the Otis Co. and Metcalf was known to Hubbard. He had known, not later than October 20, that an agreement existed between Metcalf and the Otis Company under which the fall claimed to be owned by Metcalf in connection with the privilege was about 21 feet, and that there was an agreement existing between the Otis Company and Metcalf with reference to such fall. Stevens had seen a copy of that agreement not later than October 20, 1898, because a copy thereof had been inclosed by Metcalf in a letter written
73 to the Ludlow Manufacturing Company at Ludlow, dated October 17, 1898, and received by Stevens in due course of mail. In October or November, 1898, the exact date was not fixed, but it was not later than November 23, 1898, and was apparently earlier, Stevens, in behalf of the Ludlow Manufacturing Company, employed the attorney of that company to examine the title to the Metcalf land. This attorney made an oral report of his examination to Stevens. Stevens then stated to Hubbard and Wallace that a deed should not be taken from Metcalf containing a restriction, and suggested that a deed be taken without a restriction in the name of the Ludlow Cordage Company. To this also Hubbard and Wallace assented.

A deed from Metcalf, executed by him, to the Ludlow Manufacturing Company, of the Metcalf land, was enclosed in the letter of Metcalf to the Ludlow Manufacturing Company at Ludlow, November 21, 1898, and was received the following day. This deed referred to and was made subject to the Metcalf agreement with the Otis Company, but without reciting either the substance or effect thereof. The letter enclosing it also contained the original Metcalf agreement. Both this deed of Metcalf to the Ludlow Manufacturing Company, and the Metcalf agreement, were submitted by Stevens to the attorney of the Ludlow Manufacturing Company. On November 25, 1898, Hubbard, treasurer of the Ludlow Manufacturing Co., directed the bookkeeper of that company, who was also the bookkeeper of the Ludlow Cordage Co., to draw a check to Edwin D. Metcalf, for land and water power at Palmer. Such check was drawn and the following is a copy:—

Ludlow Manufacturing Company.

Dolls. 15,000—#/100. BOSTON, Nov. 25, 1898.

Pay to the order of (New York check payable to) Edwin D. Metcalf, fifteen thousand #/100 dollars.

CHARLES W. HUBBARD, Treas.

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Two cent revenue stamp affixed bearing "I. R." in large blue print and "L. M. Co. 11/25/98" in ink.
(Indorsed:) Charles W. Hubbard, treas.

The stub of this check in the check-book contained the following entry:—

"Nov. 25TH, 1898.

"Edwin D. Metcalf paid him on a/c of land and water power at Palmer, Mass., $15,000."

This check was charged on the books of the Ludlow Manufacturing Co. to general expense of that company.

November 26, 1898, was the last day of the fiscal year of
74 the Ludlow Manufacturing Company, and the accounts between Ludlow Manufacturing Company and the Ludlow Cordage Company closed as of that date.

With the check above mentioned a draft upon New York for fifteen thousand dollars was obtained and placed in the hands of the attorney of the Ludlow Manufacturing Co., who went to Auburn, New York, and had an interview with Metcalf on December 3, 1898. He presented to Metcalf the deed to the Ludlow Cordage Company of the land purchased from Metcalf which he had already drafted, and returned to him the deed of the same land to the Ludlow Manufacturing Co. which had theretofore been sent by Metcalf. Upon examining the deed to the Ludlow Cordage Co., Metcalf referred to the change in the name of the grantee, and the attorney said, "We prefer to take the deed that way" or "My clients prefer to take the deed that way."

This deed to the Ludlow Cordage Co. was executed by Metcalf and his wife and delivered to the attorney on December 3, 1898, and the $15,000 draft delivered to Metcalf. This deed purported to remise, release and quitclaim to the Ludlow Cordage Co. the land conveyed to him by the Otis Co. and the land owned by him at the date of the execution of the agreement with the Otis Co. excepting a portion thereof which he had conveyed as above stated to the Otis Co. This deed was without any covenants of warranty whatsoever.

On December 20, 1898, at a meeting of the directors of the Ludlow Manufacturing Co. held immediately after the close of its stockholders' meeting, which stockholders' meeting was held at 11.40 a. m., the following votes were passed:—

"1. Voted that the treasurer be authorized to make such expenditures and in such manner as may be deemed advisable for the increased development of power.

"2. Voted that in view of the present earnings and prospects of the corporation, there be paid to each member of the management, *i. e.*, to Stevens, Hubbard and Wallace, the sum of $5000 as recognition of their services in addition to all salaries paid."

At this meeting Directors Hubbard, Weld, Brooks and Wallace were present.

On December 20, 1898, at a directors' meeting of the Ludlow Cordage Co. held at 11.20 a. m. in the same offices in which the directors' meeting of the Ludlow Manufacturing Company above mentioned was held, but in a different room, at which Directors Brooks, Weld, Stevens and Wallace were present, the following vote was passed, on motion of Mr. Weld, seconded by Mr. Stevens :—

"Voted that the purchase of the Metcalf water power and land on the Chicopee river be approved."

In 1894, and again in 1898, Edward P. Ball, a civil engineer, was employed by the Ludlow Manufacturing Co. to make surveys of the Chicopee river and the lands adjacent, such surveys in 1898 extending up to the plaintiff's line.

75 In January, 1899, as appears in the stipulation of the parties, he was employed to make plans for the dam to be erected at Red Bridge; such plans were made and the dam was built by the Ludlow Manufacturing Co. under the direction of Ball. Ball received his orders for his work from Stevens, and at Stevens' request, he had two interviews with Roscius C. Newell at the plaintiff's Palmer cotton mill. In speaking of his negotiations for the Metcalf land, Stevens testified that it was his custom in matters of similar importance to act without consulting the directors, trusting to their ratification which they usually gave. Stevens was accustomed to communicate by telephone from Ludlow with Hubbard and Wallace in Boston almost every day, and often several times a day.

There was also evidence that Hubbard refused to take a deed to the Ludlow Manufacturing Co., and that he said on an inquiry from Wallace, that he was through with the negotiations for the Metcalf land, and that Wallace then said that he (Wallace) would buy it for the Ludlow Cordage Co., and Wallace testified that he did buy it for the Ludlow Cordage Co., with a view to its development for purposes of that corporation, and that he talked with Stevens about it. At the time when, as Wallace testified, he purchased for the cordage Co., he had been told by Stevens that there was a restriction on the land which related to the height at which a dam could be constructed thereon, and Stevens told him that one thousand or more horsepower could be developed, but he knew nothing more as to the nature or extent of the restriction and made no inquiry.

After the time that Wallace stated that this talk with Hubbard and Stevens took place, and after the date that he stated his purpose to buy the land for the Ludlow Cordage Co. had been formed, Stevens wrote a letter in the name of the Ludlow Manufacturing Co. to Metcalf, dated December 1, 1898, in which he said :—

"As just arranged with you by telephone, one of us will plan to meet you Saturday afternoon at Auburn," and the attorney of the Ludlow Manufacturing Co. did meet Metcalf at Auburn on that day and stated that he had come to consummate the sale.

It was claimed by the Ludlow Manufacturing Co., and there was evidence tending to show that the entries on its books relative to the $15,000 were erroneous, that this $15,000 was really a loan to the

Ludlow Cordage Co., that this error was discovered late in the year 1899, and that in conference between Hubbard and Wallace it was then agreed that the Ludlow Manufacturing Co. should pay the Ludlow Cordage Co. $13,000 for land conveyed to it by Metcalf flowed by the dam and that the land not flowed should be valued at $2000, and entries were made on the books of both companies to conform to this agreement. So far as appeared no action by the directors of either company was had on this agreement, before or since it was made, except the vote of the directors of the Ludlow Cordage Co. of December 20, 1898, herein set forth, but the
76 entries made in pursuance thereof still remain on the books, the balance of debit and credit between the two companies has ever since included the results of such entries, and no officer or stockholder of either company has ever objected thereto. The effect of these entries according to the books was to make the Ludlow Cordage Co. the debtor of the Ludlow Manufacturing Co. to the amount of $2000. It did not appear what use, if any, the Ludlow Cordage Co. had for its land not flowed. I cannot discover that it had any and neither defendant offered any evidence upon that point.

The Ludlow Manufacturing Co. was accustomed to make advances to the Ludlow Cordage Co. from time to time, in large and small amounts, but it was the invariable custom in other cases in which advances of money were made by the Ludlow Manufacturing Co. to the Ludlow Cordage Co. to charge interest at the end of the fiscal year computed from the date of said advances, and it was Hubbard's custom as treasurer to fix the rate of interest.

In this case he fixed no rate of interest and no interest was charged at any time upon the $15,000, or any part thereof, until the close of the fiscal year, on or about December 1, 1899, when a charge of said $2000 was made to the Ludlow Cordage Company, and the debit balance of the account as it then stood, including said charge of $2000, was struck and the rate of interest on such balance fixed and thereafter charged. This balance was struck and the rate of interest fixed in accordance with the custom existing and which had theretofore existed in the business dealings between the companies. At the time of said charge of $2000, and at all times since, the balance of said account has been in favor of the Ludlow Manufacturing Company in varying amounts exceeding $90,000. No charge of interest was made or balance struck which included as a part thereof interest on said $2000 prior to the date when said charge of $2000 was made.

In the year 1898, but prior to October, 1898, there was a meeting of the officials of the Ludlow Manufacturing Co. and the officials of the Boston & Albany Railroad Co. with respect to change of location of the tracks of the railroad. A change of the tracks was subsequently made, removing them further from the river and putting them at a greater elevation above the river, so that they might not be flowed by the head of water raised by the Red Bridge dam.

During the year 1898 Weld, one of the directors of the Ludlow Manufacturing Co., was in the company's office in Boston nearly every week, and Hubbard talked over the affairs of the company with him, but did not remember talking about the purchase of the Metcalf land.

Stevens testified that his reason for writing the letter of December 6, 1898, Exhibit 44, was that he feared his negotiations for other lands subsequently acquired by him for the Ludlow Manufacturing Co. along the river would be rendered more difficult
77 and expensive if the Metcalf sale should become known. These other lands were the lands subsequently acquired by Stevens in the name of the Ludlow Manufacturing Co., being lands flowed by the Red Bridge dam.

Wallace testified that at the directors' meeting of the Ludlow Cordage Co., December 20, 1898, at which the vote was passed approving of the purchase of the Metcalf land, he made a brief statement mentioning the price paid for said land, referring to the fact that they had been in need of room and power for several years and that he had at last been able to secure a property which, if developed, might supply their then present needs, and that after that statement the vote of December 20, 1898, was passed on his recommendation as executive officer, and so far as appears, without inquiry, further explanation or discussion.

Upon other aspects of the case, I find as follows:—

The Otis Co. has never abandoned said lower privilege and has never assented to the erection of the Ludlow Manufacturing Company's dam, or to the building of any dam which would flow the land of the Otis Co. or injuriously affect its lower privilege, or deprive it of any of said fall of 19.65 feet referred to in the 6th article of said agreement between Metcalf and the Otis Co.

There was evidence bearing upon this last finding relied upon by the defendants which was in substance that Newell had stated to Ball and Stevens that the Otis Co. had had its water privilege examined by Lockwood, Green & Co., who had reported that it was impracticable to build a dam where its lower dam is now built, and that they had abandoned building there and had put in additional wheels at their upper dam. There was some evidence tending to contradict this. I do not find that the language used was sufficient to indicate an abandonment of the privilege, and Newell had no authority on behalf of the Otis Co. to abandon it or to give any assent to the construction of the dam which would injuriously affect its lower privilege or flow any of its land.

Early in the year 1899 Stevens called on Newell and made inquiries as to the boundary line between the Metcalf land and the plaintiff's land.

In the course of the conversation Newell stated in substance that the Otis Co. had contemplated developing its power at its lower privilege; that Lockwood, Green & Co., eminent engineers, had ex-

amined the property and their report was so unfavorable that they had given it up and had put in wheels at their upper mill.

One Green, of the firm of Lockwood, Green & Co., having been employed by the plaintiff to examine and report on the best method of obtaining such additional power as was then needed by it reported on October 12, 1898, that the privilege on which the plaintiff's lower dam was erected was large, and of such capacity
78 that it would be practically impossible to make any development, without a very large expenditure. The material portions of this report are as follows:—

"At the request of Mr. Olsen, I made a visit to the Palmer mill, Three Rivers, for the purpose of looking into the question of the advisability of developing the water power below the mill and transmitting the power by electric transmission to the mill. I found by looking at the privilege that it is quite a large privilege and of such capacity that it would be practically impossible to make any development without a very large expenditure for dam, wheel pits, etc. This expenditure would be so large that you could not afford to consider for a moment the question of making such a development for the purpose of securing the small amount of power which you now need at the mill.

"I may add that it seems to me that this is a very valuable property in view of any possible extensions of your plant in the future, for you would be enabled by a full development of this power to secure a large amount of additional power at your present site, using electric transmission. For the purpose, however, of securing additional power at the present time, I feel sure that the proposition to put in a pair of wheels at the point agreed upon, would be the wisest solution of the problem."

The point agreed upon referred to in the last sentence was at the plaintiff's upper dam. After receiving this report the plaintiff put additional water wheels in its mill at its upper dam.

The Ludlow Manufacturing Co. has erected a dam across the Chicopee river at Red Bridge about two miles below the land described in the deed from Metcalf to the Ludlow Cordage Co. and separated therefrom by certain tracts of land conveyed to the Ludlow Manufacturing Co., viz: Four parcels by Green, December 15, 1891, one by Moore, September 17, 1900, one by Brothers, February 6, 1899, one by Olds, June 15, 1899, one by Holbrook, September 27, 1900, and one by Talmadge, February 23, 1899, which said dam raises the water more than 21.32 feet on the land conveyed by Metcalf between the upper and lower boundary lines thereof, that is to say, between the location of the stake mentioned in the 2d article of said agreement and the lower line of said Sprague lot, in that said dam raises the water of said river between said lines 12.88 feet above the point to which it would be raised to afford the fall of 21.32 feet mentioned in the 6th article of the agreement between Metcalf and the Otis Co.

Stevens intentionally refrained from informing the Otis Com-

pany, or Newell, that the Ludlow Manufacturing Co. intended to build a dam which would flow the land of the Otis Co. and injuriously affect its lower privilege until April 11, 1900, when he sent Ball, the engineer of the Ludlow Manufacturing Co., to see Newell, and Ball informed Newell that the Red Bridge dam when completed would flow and destroy the lower privilege. This information was given by the direction of Stevens in consequence of a direct inquiry of Newell made April 7, in which Newell asked Stevens how high they intended to build their dam or how far back they in-
79 tended to flow. In reply to this inquiry Stevens said that the matter was in the hands of the engineer and that he would send him over to give the information to Newell. There was no fraudulent statement by the Ludlow Manufacturing Co. or its officers or agents with respect to its purpose of constructing a dam.

It was the purpose and intention of the Ludlow Manufacturing Co., or those having its affairs in charge, not to communicate or inform the Otis Co. of its intention to build a dam which would flow the land or privilege of the Otis Co. and this purpose and intention were not abandoned until April 11, 1900. The Ludlow Manufacturing Co. claimed that the filing of its plans with the county commissioners was notice to the Otis Co. of its intention to build such dam as was afterwards constructed by it, but I ruled the contrary.

Neither the Otis Co. nor any employee thereof had knowledge or notice prior to April 4, 1900, that any one intended to erect a dam which would flow land of the Otis Co. or injuriously affect its lower privilege or deprive it of any of its said fall of 19.65 feet referred to in the 6th article of that agreement. The first knowledge or notice that the Otis Co. or any officer or person in its employment had that it was intended by any one to erect such a dam was the knowledge or notice that might or would be inferred from the letter received April 4, 1900, by Newell, from J. K. Barker, which was as follows:—

SPRINGFIELD, MASS., April 3, 1900.

Mr. R. C. Newell, Three Rivers, Mass.

DEAR SIR: You may have heard that the Ludlow Co. has submitted plans and specifications of its proposed new dam at Red Bridge to the county commissioners for their approval. I saw the plans this afternoon and they call for a dam 48 feet high above extreme low water, or some 33 feet above the railroad at the site of the dam.

Yours truly, J. K. BARKER.

When the county commissioners approve the plans of the Ludlow Co. will this complete the appropriation of the power?

This letter was received by Newell on April 4, 1900, and its contents communicated by Newell to Mr. Olsen of the firm of Bliss, Fabyan & Co. at Boston, orally, on April 4.

The Otis Co. knew in the fall of 1899, that the Ludlow Manufact-

uring Co. were engaged in the work preparatory and necessary for the erection of a dam upon the site of the Red Bridge dam.

From the fall of 1899 the work which was being done by the Ludlow Manufacturing Co. at the site of its dam could be plainly seen by a person passing along on the highway, and said work was at all times from August, 1899, visible from the railroad track.

Bliss, Fabyan & Co. were the authorized agents and man-
80 agers of the plaintiff. Their acts in behalf of the plaintiff were the acts of the plaintiff; their knowledge was the knowledge of the plaintiff and notice to them, or to Mr. Olsen of that firm, was notice to the plaintiff.

The Ludlow Manufacturing Co. did not have knowledge or notice of any intention on the part of the plaintiff to build a dam at its lower privilege until April 27, 1900, when it received a letter from Newell stating that the plaintiff had intended for some time to construct a dam and erect a mill at its lower privilege and stating that "the work is now in progress." But Stevens had been informed by Newell on March 24 and April 7, 1900, that the plaintiff was "thinking of developing its water power" at its lower privilege. At the date of the receipt of this letter of April 27 the Ludlow Manufacturing Company understood that such dam would be flowed by the Red Bridge dam.

There was evidence as to the condition and progress of the work on the Ludlow Manufacturing Co. dam apart from the preparatory work, bearing on the findings as to knowledge and notice of and to the plaintiff, but such work on April 4, 1900, had progressed only to the extent of making as a part of the tail race an excavation from 8 to 10 feet deep, about 25 to 30 feet long and 12 to 15 feet wide, and of stripping some of the soil at the sides of the dam. The excavation in question was begun August 3, 1899, and the work of stripping the soil was commenced March 30, 1900, and completed some time between the first and fourteenth days of the following June, and was not sufficient to indicate to a person not an engineer experienced in the construction of dams the height of the proposed dam or the extent to which it would set back the water of the stream.

The work of construction of the plaintiff's dam did not begin until August 11, 1900.

It appears that the plans for the Red Bridge dam were completed in January, 1900, and that they were delivered by Ball to Stevens completed on or about January 4, 1900; that Ball had been making plans for several months prior to that time, and that blue prints of plans were generally at the Boston office of the Ludlow Manufacturing Co. when Ball was there.

In 1899 and 1900 Ball went to the office of the Ludlow Manufacturing Co. and met some of the directors there on September 22, November 2, December 9 and December 21, 1899, and on February 21, 1900. Among those whom he saw there on some or all of these occasions were Stevens, Hubbard, Weld, Bowditch and Wallace, all

of whom except Stevens were directors of the Ludlow Manufacturing Co.

The Ludlow Manufacturing Co. on March 30, 1900, filed with the county commissioners plans and specifications of its proposed dam, and these plans and specifications were approved by the county commissioners April 13, 1900.

The dam as actually constructed was six feet thicker than indicated by the plans and specifications, and there were other
81 departures in construction from the plans and specifications, but such changes rendered the dam more strong and secure and such changes seem to me to be immaterial in this cause.

The Otis Co. filed its plans and specifications with the county commissioners June 7, 1900, which were then duly approved by the commissioners.

It was claimed by the Ludlow Manufacturing Co. that such plans and specifications of the Otis Co. show that they were not in compliance with chapter 120 of the Public Statutes and the plaintiff made the same claim with reference to the plans and specifications of the dam of the Ludlow Manufacturing Co., but I deem that the determination of these claims is immaterial in this cause and make no finding thereon. Such plans and specifications and certain other additional plans and specifications were introduced in evidence and may be referred to.

The record of the county commissioners with reference to the plans and specifications of both the Ludlow Manufacturing Co. and the Otis Co., contains this language :—

"And the commissioners having inspected the work during its progress and it appearing that the said plans and specifications have been faithfully adhered to, it is ordered that the same be recorded."

The dam of the Otis Co. at its lower privilege floods a portion of what was a public highway until such highway was relocated by the county commissioners; such relocation was made September 14, 1900.

The plaintiff introduced (subject to the objection of the Ludlow Manufacturing Co.) evidence tending to show knowledge and notice on the part of the Ludlow Manufacturing Co. of an intent of the Otis Co. with respect to the development of its water power, and the condition and progress of the work upon its dam and the dam of the Otis Co. at various times, claiming the same to be competent upon the question of the remedy to which the plaintiff might be entitled and upon the question of the constitutionality of chapter 190 of the Public Statutes.

The evidence as to the knowledge of the Ludlow Manufacturing Co. of the intent of the Otis Co. to construct its dam has already been stated in part. It further appeared that in August, 1900, and prior to the 17th of that month, the Ludlow Manufacturing Co. knew that the Otis Co. was engaged in the work of constructing the dam at its lower privilege under the claim that if the Otis Co. completed that dam before the Red Bridge dam was completed, the Ludlow

Manufacturing Co. would not have the right to flow out the Otis Co.'s lower privilege by a dam completed later.

The evidence as to the condition and progress of the work of the Otis Co. dam from time to time now seems to me immaterial in view of the stipulation of the parties that the work on both dams was prosecuted and carried to completion with reasonable diligence, and in view of the facts that the time when the Ludlow Manufacturing Co. knew of the intent of the Otis Co. to develop its power is fixed by the letter of Newell to the Ludlow Manufacturing Co. as of April 27, 1900, when no work of construction had been done by the Otis Co., that the dam of the Ludlow Manufacturing Co. would flood any dam that might be constructed at the site of plaintiff's lower dam, and since the date of beginning and completion of both dams is fixed without controversy. Without attempting to state in detail the evidence as to the condition and progress of the work on the dam of the Ludlow Manufacturing Co. apart from the preparatory work, I found that it was as follows: On April 4, 1900, as has already been stated. On April 27, 1900, such work had further advanced only in respect of the work of removing and stripping the soil. On August 5, 1900, such work had proceeded to the following extent: tail race had been excavated for several hundred feet to a depth of five feet; the excavation for the core wall of the south dike had proceeded to some extent and the earth removed from the core wall trench was being used to build up the dike, but the work had not proceeded sufficiently to build the dike up above the natural surface of the ground before the soil was stripped. The excavations for the core wall in the bed of the river had progressed to some extent. The trench for the core wall for about ninety feet in length was in process of excavation. On the south side excavations of raceway and iceway were also then in progress.

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On September 8, 1900, the laying of the stone work of the dam was begun. September 20, 1900, no part of the stone work of the rollway had been laid, and no portion of the dam had been brought above the natural surface of the ground or of the stream, excepting that the earth from the excavations of the trench from the core wall on the south side had been piled up three feet high on one side and eight feet high on the other side of the trench to form the dike.

The contract between the Ludlow Manufacturing Co. and the contractor for the construction of its Red Bridge dam contained the following stipulations viz.:—

"The contractor is to furnish all labor and material for and build a stone and earth dam across the river, stone bulkhead, canal, head gates, wasteweir, iceway, brick power house, raceway and road, in accordance with plans marked 'Red Bridge dam,' dated—"

"The dam is to be built partly of masonry and partly of earth, approximately on the lines shown; but if the character of the materials or circumstances arise which render it advisable to change the location of the dam or to change the plans of the dam, the company expressly reserves the right so to do without payment of dam-

ages to the contractor, but all work actually completed will be paid for as per price bid for the whole work."

"The masonry portion of the dam will be about three hun-
83 dred feet in length and will be a solid mass of masonry faced on the downstream side with range stone laid in courses."

"The work to be done, in a general way, consists in stripping the site of the dam; building up the embankment in layers, and in paving or otherwise protecting their surfaces; doing all blasting, excavating, filling, rock and timber work; constructing all masonry; building in all iron work in connection with brick or other masonry; laying pipes through dam; doing all carpenter work in connection with bulkhead house, head gates and power house; provide all necessary cofferdams; doing all pumping or other temporary work in connection with the permanent work, and deliver over to said company the whole work in a complete condition with the masonry all pointed and with the dam, bulkhead, canal, wasteway, wheel pits, tail race and road ready to be put into service in accordance with the plans and these specifications."

"All the work during its progress and on its completion must conform truly to the lines, grades and levels to be determined and given hereafter by the engineer, and due facilities and such assistance and materials as he may require must be furnished by the contractor without extra charge, and the engineer's marks must be carefully preserved. The work must also be built in accordance with the plans and directions which shall be given by him from time to time, subject to such modifications and additions as said engineer shall deem necessary during the prosecution of the work, and in no case will any work which may be performed, or any material furnished in excess of the requirements of this contract or of the plans or of the specifications be estimated and paid for, unless such excess shall have been ordered by the company as hereinafter set forth."

"The foundation work for the stone dam, core walls of dam and for other structures is to be extended to such depth and in such a manner as shall be ordered by the engineer."

"The position of the bed rock being uncertain it is impossible to indicate the bottom of the core wall with accuracy, and it is distinctly understood that the lines for the foundation shown on the plans are not guaranteed by the company to be correct."

"Should it be found desirable by the company to make alterations in the form or character of any of the work, the said company may order such alterations to be made, defining them in writing and drawings, and they shall be made accordingly; provided, that in case such changes increase the cost of the work, the contractor shall be fairly remunerated; and in case they shall diminish the cost of the work, proper deduction from the contract price shall be made; the amount to be paid or deducted to be decided by the engineer."

"The said contractor further agrees that if the work to be
84 done under this agreement shall be abandoned, or *if this contract shall be assigned by the said contractor* otherwise than as herein specified, or if at any time the engineer shall be of the opinion, and shall so certify in writing to the said company that the said work is unnecessarily or unreasonably delayed, or that the said contractor is wilfully violating any of the conditions or agreements of this contract or is not executing said contract in good faith, or is not making such progress in the execution of the work as to indicate its completion within the required time, the said company shall have the power and right to notify the said contractor to discontinue all work, or any part thereof, under this contract; and thereupon the said contractor shall discontinue said work or such part thereof as said company may designate; and the said company shall thereupon have the power, by contract or otherwise, as it may determine, to employ such and so many persons, and to obtain such animals, carts, wagons, implements and tools as the company may deem necessary; and to use such implements, tools and materials of every description as may be found upon the line of said work, both such as enter into the completed work and such as are necessarily used in and about the same in the course of construction, and to procure other materials for the completion of the same; and to charge the expense of said labor and material, animals, carts, wagons, implements and tools to the said contractor, and the expense so charged will be determined and paid by the said company out of such moneys as may be either due, or may at any time thereafter become due, to the said contractor, under and by virtue of this contract or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed by said contractor, then the said contractor shall be entitled to receive the difference, and in case such expense shall exceed the sum which would have been payable under this contract if the same had been completed by the said contractor, then the said contractor shall pay the amount of such excess to the said company, but such excess shall not exceed the amount owed by said company under this contract at the time said contractor is notified to discontinue said work, or any part thereof, plus the amount of the bond executed by said contractor for the performance of this contract."

The contract between the Otis Company and the contractor for the construction of its dam at its lower privilege contained the following stipulations, viz:—

"It is further agreed that all additions and alterations of any kind that the owners may desire to have made to or in the work shown on the original drawings, during the execution of this contract, shall be made by the contractors, for which due allowance shall be made, and such change shall in no way affect or make void this contract."

"This provision is also to include all such changes in depth or

dimensions of the foundations, or of other parts of the work
85 from those indicated on the original plans, as may be found expedient during the progress of the work, in order to meet the natural and unforeseen conditions of the site, and still secure the prescribed limitations for safety."

"In case of the refusal or failure of the contractors after reasonable notice to prosecute the work with proper diligence, or to supply a sufficiency of skilled workmen, or of proper materials or to execute the work in a satisfactory or expeditious manner, or in case of any other violation of this contract, then if the said architects and engineers shall certify that such refusal, failure, or violation is sufficient grounds for such action, the owners shall be at liberty after three days' notice in writing to the said contractors of *his* intention so to do, to provide any such labor or materials as the architects and engineers may advise, deducting the cost thereof from any money then due or thereafter to become due under this contract; or they may terminate the employment of said contractors on all of said work, and take possession of all materials thereon, and employ any such person or persons to finish the work and provide the proper materials therefor, as required under this contract. And in case of such debarment of said contractors and assumption of work by the owners, then the contractors shall not be entitled to receive any further payments under this contract until the said work shall be wholly finished, but the said contractors shall be indebted to the said owners for all expenses incurred thereby, or for any damage sustained through such default, and the amount of such expense and damage may be retained by said owners, out of the unpaid balance of the amount stipulated herein to be paid the said contractors."

On the second day of August, 1900, R. C. Newell wrote and sent by mail to Lockwood, Greene & Co. a letter of which the following is a copy :—

EXHIBIT 179.

Palmer Mill.

THREE RIVERS, MASS., Aug. 2, 1900.

Messrs. Lockwood, Greene & Co., Boston.

GENTLEMEN: Referring to conversation with your Mr. Harris today and the telegram from Mr. Greene which you telephoned us as follows:

"Advise Newell, also Olsen, that we will furnish all plans and specifications, and assume all responsibility for good work for 4 per cent. on full cost of complete work, and $150 per month for superintending engineer, or will do all for 5 per cent. of completed work and we will furnish superintendent."

We accept the first proposition, and place the matter in your hands on the basis of 4 per cent. of cost of work completed and $150 per

month for superintending engineer. In case operations are
86 suspended, or terminated, at any point before the complete execution of the plans, you are to make such allowance from this basis as will be reasonable and satisfactory to us.

You are to arrange for all contracts in this connection subject to our approval, and assume all responsibility for good work and prompt execution, within such time as shall fully protect our interests with which you are entirely familiar. It is understood that all contracts for labor and materials are to be made on such basis that they may be suspended, or terminated, at any point at our option.

We understand that your men are already at work on detail plans, as the writer arranged with Mr. Shedd, and that no time will be lost in getting men on the ground to begin active operations.

Yours truly, R. C. NEWELL, Supt.

The defence offered in evidence six letters written some by Newell to Bliss, Fabyan & Co., and some by Bliss, Fabyan & Co. to Newell. The plaintiff objected to these letters, but I admitted them. Copies of the letters are as follows:—Exhibits 163, 162, 165, 164, 165, 167:—

EXHIBIT 163.

Bliss, Fabyan & Co., 100 Summer Street.

BOSTON, April 5, 1900.

R. C. Newell, Esq., supt. Palmer mill.

DEAR SIR: One of the points which we wish to be satisfied about in this question of the flowage from the dam that the Ludlow Company contemplates is to ascertain by a survey just how far up the water from such a dam would flow towards your wheels of the present mill, so as to know what leeway there would be between your present raceway and the highest point that the water of the dam would flow to.

Another point that would also seem to be well to ascertain from Mr. Gardner would be if it would not answer every purpose to preserve our privilege if we were to put in a dam only 5 or 6 feet high and establish a saw mill or any other cheaply constructed mill, so that we could limit the amount of expense there to a minimum sum until such time as we saw fit to enlarge our dam and privilege for the transmission of electricity or other purposes.

It seems to the writer that our main purpose at the present time should be to preserve our privilege at the smallest expense possible, and then having done so whether that would not establish our rights for all time to put up any structure and dam of any size we saw fit, so as to develop the water power to its fullest extent, if we should some time wish to do so.

Yours truly, BLISS, FABYAN & CO.

87 EXHIBIT 162.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 6, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Your favor of the 5th inst. is received.

There is say 40.97 feet fall from our present raceway to the lower line of the Metcalf privilege. There is a fall of about 13 ft. from that point to the point quite a little below the proposed site for the Ludlow Co.'s dam, as the writer once ascertained by personally assisting in taking the levels. As we remember it, we think there may be say 3 or 4 feet of this 13 ft. fall below the location of the dam. The plans and specifications filed by the Ludlow Company with the county commissioners call for a dam 48 feet high.

Perhaps this may afford the information sufficient for your present purpose, but we shall be pleased to have an engineer go over it again if you wish exact figures. The erection and maintenance of a saw mill, or any other "mill" of cheap construction with a low dam just sufficient to afford necessary power for operation would preserve our rights. Of course the location would be so made as to discharge the water from the wheel at the lowest point or our lower line. The writer's present impression is that this may perhaps serve the greatest purpose, but will advise you further with approximate estimate of cost as soon as the sufficient data can be collected. Meantime we are engaged in the preliminary work necessary to protect our interest.

Yours truly, R. C. NEWELL, Supt. G.

Dictated by R. C. N.

EXHIBIT 164.

APR. 7, 1900.

R. C. Newell, Esq., supt. Palmer mills.

DEAR SIR: In reference to the building of a dam at Three Rivers on the Otis Company's privilege, we are all unanimously of the opinion that something should be done to preserve our rights, and that a timber dam should be started as soon as possible, somewhat in accordance with the suggestions made of a dam 6 or 10 feet high, so as to get it in at the earliest possible moment with the least delay and expense. In a letter from Mr. Baker this morning he says that it is probable that you have timber enough on the Otis property at Three Rivers that would be available for the timbers of the
88 dam that would answer the purpose for our immediate needs, and we ought to hasten the making of the plans as soon as possible, and if the laws require the filing of any plan with the

county commissioners, that we should get ready to do so at the earliest moment.

We only write this preliminary so that you may take such steps in advance as you may think best until you get definite and official orders to go ahead, in the meantime, of course, submitting your plans for approval here.

Yours truly, BLISS, FABYAN & CO.

Probably it may be best to make plans for a 10-foot dam, as the additional cost could not be very much and might answer the purpose for a longer time.

EXHIBIT No. 165.

Palmer Mills (of the Otis Company).

THREE RIVERS, MASS., April 10, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Your favor of the 7th inst. with reference to new dam is received.

As we advised you last week, we are having the preliminary work done, and hope to have sketches to submit to Mr. Greene with reference to location early next week.

The writer met Mr. Stevens, the agent of the Ludlow Company, Saturday, and in conversation with him asked how far back they intended to flow. He replied by saying that he would have their engineer come and look it over with us, and the writer responded that we would be glad to have him do so.

We will endeavor to keep you fully advised in this connection.

Yours truly, R. C. NEWELL, Supt.

As we suppose Mr. Stevens sailed for England yesterday we hardly expect to see their engineer right away.

EXHIBIT No. 166.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 7th, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: We enclose letter from Messrs. Gardner & Gardner confirming ours of yesterday with reference to the protection of our lower mill privilege.

Yours truly, R. C. NEWELL, Supt.

(Enclosure.)

89 EXHIBIT No. 167.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 25th, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Referring to Mr. Olson's suggestion today about voting the construction of the dam, etc., at our lower mill privilege.

It seems to me that, in view of circumstances which may arise, it is desirable to have the vote include approval of the work already done, or that it may be so worded as to refer to a work already begun and in process. We did begin actual work some weeks ago, and it seems to me desirable that as early a date as possible should be maintained. Doubtless this may have occurred to you, but I trust this suggestion may not be deemed out of place.

Yours truly, R. C. NEWELL, Supt.

Such determination as was made by the plaintiff on April 4 to erect a dam was for the purpose of preventing the appropriation by the defendant Ludlow Manufacturing Company under its prior determination, and did not comprehend the dam subsequently erected by the plaintiff.

No determination of the plaintiff on April 4 to erect a dam was arrived at until after notice to it of the Ludlow Manufacturing Company's determination to erect a dam which would cause the plaintiff's dam and alleged mill site to be flooded to substantially the extent to which the present dam of the Ludlow Manufacturing Company is capable.

On the 26th of April, 1900, the directors of the Otis Co. passed the following vote:—

"*Voted:* That the treasurer of this corporation continue the work of survey and plans for the construction of a dam on the water privilege owned by this company on the Chicopee river about one mile below the present site of the Palmer mill at Three Rivers, and proceed with the construction of such dam as soon as practicable, of such construction and dimensions as in his judgment may be deemed best. Also erect a building or buildings at or near said dam and water privilege for the purpose of utilizing the water power to be developed by said dam."

The average total net twenty-four hour flow of the dryest month of an average year gives at the plaintiff's dam, with a net head of 18 feet, 514.24 horse-power on the water wheel shafts, and no more, as contended by the defendant, or 560 horse-power on the
90 water wheel shafts, and no more, as contended by the plaintiff, and the average total net twenty-four hour flow of the dryest month of the average year, if used in ten hours with the same

head, would give at the plaintiff's dam 1234 horse-power on the water wheel shafts, and no more, as contended by the defendant, or 1344 horse-power on the water wheel shaft, and no more, as contended by the plaintiff.

The plaintiff claimed and offered to show in each instance that the power so given would equal the larger amount, and the defendant claimed and offered to show in each instance that it would not exceed the smaller amount. The master, deeming this evidence immaterial for the purposes of this case, excluded the evidence offered by each. Each party excepted to the exclusion of the evidence offered by it, and if the evidence excluded is material on the question of the right of the plaintiff to maintain the bill, and if either of the parties is injured by its improper exclusion, the case is to be recommitted to the master for further hearing and findings on the questions raised by said offers.

The plaintiff claimed and offered to prove that the defendant had sufficient water and steam power for the present and future working of its mills without raising the waters of the stream so as to affect the plaintiff; and the defendant claimed and offered to prove that, in addition to its present power, the defendant needed for the present and future working of its mills all the power that can be developed by its said dam. The master excluded the evidence offered by each, on the ground that it was immaterial. Each party excepted to the exclusion of the evidence offered by it.

The defendant claimed and offered to prove that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said dam. And the plaintiff claimed and offered to prove that, in addition to its present water and steam power, it needed, for the present and future working of its mill, all the power that can be developed by its said dam.

The master excluded the evidence offered by each on the ground that it was immaterial. Each party excepted to the exclusion of the evidence offered by it.

If the evidence excluded is material on the question of the plaintiff's right to maintain its bill, and if either of the parties is injured by its improper exclusion, the case is to be recommitted to the master for a further hearing, and findings on the question raised by said offers.

No evidence was introduced by either party to show the cost to the defendant of cutting down its said dam to a point thereof so that the remainder left after such cutting down would not raise the waters of the river so as to reduce the head of water created by plaintiff's dam, and interfere with the operation of plaintiff's water wheels; and no evidence was introduced by either
91 party to show the amount of damages which the defendant's dam will cause the plaintiff if maintained, and no finding is made upon these points. If such evidence shall be deemed material

to the decision of this case, then the case is to be recommitted to the master for further hearing on these points.

The plaintiff requested me to find and report the date when the Ludlow Manufacturing Co. first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes, viz.:—

"Nor shall a mill dam be erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied."

I find that this date was August 3, 1899,—the date stated in the stipulation of the parties as the date when it began the construction of its dam.

The plaintiff requested me also to find and report the date that the Ludlow Manufacturing Co. first occupied the Red Bridge site as a mill site, within the meaning of the above-quoted clause of the statute, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site.

It appears by the stipulation of the parties that the Ludlow Manufacturing Co. in January, 1899, employed Ball to make surveys, cross sectionings, soundings, plans and estimates necessary for the erection in a completed form on the Red Bridge location of a mill dam and other structures, and to do such other acts and things as would be necessary for the proper development of the water power on said mill site.

It further appears in the stipulation that immediately thereafter the Ludlow Manufacturing Co., having determined on the present height and site of the dam, said Ball and the agents and employees of the Ludlow Manufacturing Co. commenced the work of preparation for the building of the dam and structures and making the development and prosecuted the work of preparation for and the building of the dam and structures and making the development continuously and with due diligence to the completion thereof within a reasonable time.

It further appears in said stipulation that the Ludlow Manufacturing Co. began its dam by commencing the construction of the tail race thereof on August 3, 1899. I find that the date last above requested by the plaintiff was August 3, 1899.

The plaintiff requested me also to find and report the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Co. within the meaning of said clause after it had determined upon the height of the Red Bridge dam.

Referring again to the stipulation and to the evidence in the case, I find that the first act of occupation was the excavation of the tail race which began on August 3, 1899.

92 It is agreed by the parties that such of the exhibits used before me as either party desires may be referred to.

The plaintiff requested me to rule:—

1. That said clause of the statute does not authorize the owner of a mill site, who has first commenced to occupy it as such by first preparing to erect, or by first commencing to erect a mill dam, and who builds and puts in operation a mill in accordance with said clause, to complete the erection of such dam and thereby raise the waters of the stream so as to flow and injure an upper mill site on said stream, the owner of which upper mill site had first completed thereon the erection of a mill dam and thereby raised the waters of said stream and used them in working a water mill before the lower dam was completed or used to raise said water.

2. That if said section 2 does authorize the owner of such lower mill site to flow and injure an upper mill site, under the circumstances stated in the last stated request, then said section is in violation of the Constitution of the United States and of the constitution of Massachusetts.

3. That the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900.

4. The plaintiff's dam does not violate any of the common law rights of either of the defendants.

5. The letters between Newell and Bliss, Fabyan & Co., admitted in evidence *de bene*, are immaterial and should be excluded.

6. The action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and the deeds from Dunn conveyed to the plaintiff the land described therein.

I gave the 3d, 4th and 6th requests, and refused to give the 1st, 2d and 5th.

The defendants requested the following rulings:—

1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege.

2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill site as such.

3. Prior to the time the Otis Company commenced the erection of its dam, the mill site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company.

93 4. The mill dam of the Ludlow Manufacturing Company was begun before any occupancy by the Otis Company of its alleged mill site or so-called lower privilege.

5. The Ludlow Manufacturing Company, within a reasonable time after the commencement of its said occupation, completed and

put in operation a mill for the working of which the water of the said Chicopee river was applied.

6. The alleged plans filed with county commissioners of Hampden county by the Otis Company were not such as are contemplated by Pub. Stats., chap. 190.

7. The dam of the Otis Company was not built in substantial accordance with the alleged plans filed by it with the county commissioners.

8. The dam of the Otis Company was not built in substantial accordance with the alleged specifications filed by it with the county commissioners.

9. Nothing contained in the so-called Metcalf agreement prohibited the Ludlow Manufacturing Company from erecting and maintaining its present dam and the flowage occasioned thereby.

10. The alleged Metcalf agreement contemplated only that Metcalf or his assigns should not construct a dam on the so-called Metcalf tract which should afford more than twenty-one and thirty-two hundredths (21 32/100) feet fall and could not prohibit the erection by the Ludlow Manufacturing Company of a dam upon its land substantially two miles below, where its said dam has been erected.

11. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions and inasmuch as in each of said deeds there was a covenant with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement became inoperative and ceased to be effective between the parties thereto.

12. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions, and inasmuch as in each of said deeds there was a covenant with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement could not operate to prevent the Ludlow Cordage Company from erecting a dam upon the land deeded by Metcalf to it, of dimensions such as would afford more than 21 32/100 feet fall.

13. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions, and inasmuch as in each of said deeds there was a covenant
94 with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement could not operate to

prevent the Ludlow Manufacturing Company from erecting a dam upon its land at the site of the present Red ridge-dam and of the dimensions of its present dam.

14. If the Ludlow Manufacturing Company had knowledge of the contents of the alleged Metcalf agreement, it would not be prevented thereby from erecting a dam upon its land, which is the site of its present dam and of the dimensions of its present dam.

15. Even if the defendant Ludlow Manufacturing Company did for its own benefit and use purchase of said Metcalf the land conveyed by him to the Ludlow Cordage Company, and if the Ludlow Manufacturing Company and the Ludlow Cordage Company, one or both, at the time of said purchase had knowledge of the contents of the alleged Metcalf agreement, said Ludlow Manufacturing Company would not be prevented thereby from erecting a dam upon its land which is the site of its present dam and of the dimensions of the present dam.

16. Even if the deed to the Ludlow Cordage Company was taken by it with knowledge of the terms of the Metcalf agreement, and for the benefit and use of the Ludlow Manufacturing Company, said Ludlow Manufacturing Company was not prohibited from erecting and maintaining its present dam and thus creating and maintaining the flowage occasioned thereby.

17. Even if said land described in the deed from Metcalf to the Ludlow Cordage Company did legally or in equity belong to or was the property of the Ludlow Manufacturing Company, said Ludlow Manufacturing Company was not prevented thereby from erecting a dam upon the tract of land which is the site of its present dam and of the dimensions thereof.

18. Said land so described does not belong to and is not the property of the Ludlow Manufacturing Company.

19. Even if the Ludlow Cordage Company, before the time of the purchase of said land from Metcalf and the delivery of the deed from Metcalf to it, did have knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, it would not thereby be prevented from the erection of a dam upon the said Metcalf tract of the dimensions of the present dam of the Ludlow Manufacturing Company.

20. Even if the Ludlow Manufacturing Company, before the time of the purchase of said land from Metcalf and the delivery of the deed from Metcalf to the Ludlow Cordage Company, did have knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, it would not thereby be prevented from the erection of a dam upon the tract of land which is the site of its present dam and of the dimensions thereof.

95 21. Whatever knowledge Stevens may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

22. Whatever knowledge Stevens may have possessed prior to the

delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

23. Whatever knowledge Hubbard may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

24. Whatever knowledge Hubbard may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

25. Whatever knowledge Wallace may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

26. Whatever knowledge Wallace may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

27. The purchase of said land from Metcalf and the taking of a deed thereof by the Ludlow Cordage Company were not acts in fraud of any legal rights of the plaintiff.

28. In failing to commence its proceedings before the completion of the Ludlow Manufacturing Company's dam, the plaintiff was guilty of laches.

29. "Said Ludlow Manufacturing Company did not, for its own purpose, purchase of said Metcalf the land conveyed by him to the Ludlow Cordage Company, and is not the legal and equitable owner of the land so purchased."

30. "The Ludlow Manufacturing Company neither at nor before the delivery of the deed from Metcalf to the Ludlow Cordage Company had any knowledge of said alleged agreement between Metcalf and the plaintiff, and neither did it have knowledge at or before said delivery of said deed that Metcalf or his assigns had no right to construct a dam in the development of the water power of said river which would develop more than 21.32 feet fall on the land conveyed by Metcalf to the Ludlow Cordage Company, or which would raise the water of said river to a greater hight than the copper bolt set by the plaintiff and said Metcalf."

31. "The Ludlow Manufacturing Company was not and is not the legal and equitable owner of the land conveyed by Metcalf to the Ludlow Cordage Company. The Ludlow Cordage Company purchased said land in its own name and for its own purposes, and in so doing there was no attempt or intention on its part to
96 conceal the real ownership of said land, legal or equitable, or make it appear that said Ludlow Manufacturing Company was not in law or equity an assign of said Metcalf, or that said Ludlow Manufacturing Company was not in law or equity bound by the

alleged covenants, agreements and restrictions contained in said Metcalf agreement."

32. In the purchase of said land by the Ludlow Cordage Company, the Ludlow Manufacturing Company did not participate in any attempt or intent to conceal the real ownership of said land, legal or equitable, or to make it appear that it was not in law or equity an assign of said Metcalf, or that it was not in law or equity bound by the alleged covenants, agreements or restrictions contained in said Metcalf agreement.

33. The title of the Ludlow Cordage Company to the lands described in said deed to it from Metcalf is absolute in it and is not colorable.

34. The Ludlow Cordage Company, before the time of the purchase of said land from Metcalf and the delivery of a deed from Metcalf to it, had no knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, nor of any alleged covenants, easements or restrictions thereby claimed to be created.

35. In the purchase of said land from Metcalf and in the taking of a deed thereof by the Ludlow Cordage Company it did not participate in any purpose of enabling the Ludlow Manufacturing Company to really own and control the land comprehended thereby or evade the terms of said Metcalf agreement.

36. "Upon the pleadings and the evidence the plaintiff is not entitled to any relief."

37. "The allegations contained in the plaintiff's bill are not sustained."

Of these rulings I gave the 1st, 2d, 3d, 4th, 5th, 9th, 14th, 15th, 16th, 17th and 20th.

I gave the 27th in this form:—

27. The purchase of said land from Metcalf and the taking of a deed thereof in the name of the Ludlow Cordage Co., were not acts in fraud of any legal rights of the plaintiff.

I declined to give the 6th, 7th, 8th, 10th, 11th, 12th, 13th, 18th, 19th, 21st, 22d, 23d, 24th, 25th, 26th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, 36th and 37th. In lieu of the 36th and 37th I gave the following:—

Upon the facts found and agreed, I rule as matter of law that the plaintiff is not entitled to any relief.

I consider the 10th, 19th, 21st and 23d immaterial in view of other rulings and findings, and they are not given for that reason.

The objections of the parties are appended to this report.

JAMES R. DUNBAR, Master.

Filed Dec. 10, 1903.

97 Plaintiff's Objections to Master's Report.

The plaintiff objects to the master's report because the master does not make the following findings or rulings:—

1. That said Red Bridge dam, erected by the Ludlow Manufacting Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water mill of the plaintiff on the same stream.

2. That said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the mill site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

3. That said lower dam of the plaintiff was not erected in violation of said section 2 to the injury of any mill site of the defendants or either of them, existing on the same stream.

4. That said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them, occupied as such by them or either of them.

5. That said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

6. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the constitution of Massachusetts and void.

7. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised,
98 and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the fourteenth amendment of the Constitution of the United States and

void, in that it authorizes depriving a person of his property without due process of law.

8. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right thereafter to complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to destroy thereby the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the fifth amendment of the Constitution of the United States and void, in that it authorizes the taking of private property without just compensation.

9. That the terms and conditions of said Metcalf agreement bound the assigns of said Metcalf not to erect the Red Bridge dam at the place and in the manner in which the master finds it was erected.

10. That the Ludlow Manufacturing Company is an assign of said Metcalf within the meaning of said agreement.

11. That, by reason of the terms of said agreement and the knowledge thereof by said Ludlow Manufacturing Company at the time it purchased the land of Metcalf and took from him the deed thereof to the Ludlow Cordage Company, and by reason of the other matters and things found by the master and stated in his report, the Ludlow Manufacturing Company had no right to build and maintain said Red Bridge dam.

12. That said Red Bridge dam was erected in violation of the rights of the plaintiff and the plaintiff is entitled to relief.

13. That said Red Bridge dam was erected in violation of the plaintiff's rights and that the plaintiff is entitled to the relief sought, and is entitled to have said dam abated so that it will not be maintained to the injury of the plaintiff's mill, nor to the injury of the plaintiff's mill site, nor to the injury of the water power developed by the plaintiff as stated in the report of the master.

14. Because the master excluded the evidence offered by the plaintiff of the twenty-four hour flow, and of the twenty-four hour flow, if used in ten hours, of said stream, in the driest month of an average year, at the plaintiff's dam.

15. Because the master excluded the evidence offered by
99 the plaintiff to prove that the defendant had sufficient water and steam power for the present and future working of its mill without raising the waters of the stream so as to affect the plaintiff.

16. Because the master excluded the evidence offered by the plaintiff to prove that, in addition to the plaintiff's present water and steam power, it needed for the present and future working of its mill all the power that can be developed by its said lower dam.

17. Because the master refused to give the first ruling requested by the plaintiff.
18. Because the master refused to give the second ruling requested by the plaintiff.
19. Because the master refused to give the fifth ruling requested by the plaintiff.
20. Because the master gave the first ruling requested by the defendants.
21. Because the master gave the second ruling requested by the defendants.
22. Because the master gave the third ruling requested by the defendants.
23. Because the master gave the fourth ruling requested by the defendants.
24. Because the master gave the fifth ruling requested by the defendants.
25. Because the master gave the ninth ruling requested by the defendants.
26. Because the master gave the fourteenth ruling requested by the defendants.
27. Because the master gave the fifteenth ruling requested by the defendants.
28. Because the master gave the sixteenth ruling requested by the defendants.
29. Because the master gave the seventeenth ruling requested by the defendants.
30. Because the master gave the twentieth ruling requested by the defendants.
31. Because the master gave the twenty-seventh ruling requested by the defendants.
32. Because the master gave any of the rulings requested by the defendants.

BOYD B. JONES,
Solicitor for Plaintiff.

100 Objections of Ludlow Manufacturing Company.

This defendant makes the following objections to the master's report:—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement, and that the Ludlow Manufacturing Company is in equity

the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further objects to said report because of the admission and consideration of the evidence objected to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this objection were based.

101 2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures

and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3, 1899, because
102 it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail race, which began on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation for the building of said dam and said structures* and making said development and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff

that the action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defend-
103 ants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the refusal of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

104 30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.
33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.
34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.
35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.
36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.
37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.
38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Attorneys.

105 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Objections of Ludlow Cordage Company.

This defendant makes the following objections to the master's report:—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement *was* at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further objects to said report because of the admission and consideration of the evidence, objected to by the de-

fendant and by the master held to be immaterial, upon which the findings which are the subject of this objection were based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the
106 cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11th, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11th, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

107 7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the

meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

108 9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail-race, which began on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation for the building of said dam and said structures* and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell dated April 30th, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site and be-

109 cause of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30th, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to re-locate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

110 18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the request of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

111 31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.

33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.

34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.

35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.

36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.

37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.

38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Att'ys.

112 Plaintiff's Exceptions to Master's Report.

The plaintiff excepts to the master's report because the master does not make the following findings or rulings:—

1. Said Red Bridge dam, erected by the Ludlow Manufacturing Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water mill of the plaintiff on the same stream.

2. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the
113 mill site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

3. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them existing on the same stream.

4. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them occupied as such by them or either of them.

5. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

6. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby

destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the constitution of Massachusetts, and void.

7. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the 14th amendment of the Constitution of the United States, and void, in that it authorizes depriving a person of his property without due process of law.

8. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon
114 in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to destroy thereby the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the 5th amendment of the Constitution of the United States, and void, in that it authorizes the taking of private property without just compensation.

9. The terms and conditions of said Metcalf agreement bound the assigns of said Metcalf not to erect the Red Bridge dam at the place and in the manner in which the master finds it was erected.

10. The Ludlow Manufacturing Company is an assign of said Metcalf within the meaning of said agreement.

11. By reason of the terms of said agreement and the knowledge thereof by said Ludlow Manufacturing Company at the time it purchased the land of Metcalf and took from him the deed thereof to the Ludlow Cordage Company, and by reason of the other matters and things found by the master and stated in his report, the Ludlow Manufacturing Company had no right to build and maintain said Red Bridge dam.

12. Said Red Bridge dam was erected in violation of the rights of the plaintiff.

13. Said Red Bridge dam was erected in violation of the plaintiff's rights, and the plaintiff is entitled to the relief sought and is entitled to have said dam abated so that it will not be maintained

to the injury of the plaintiff's mill, not to the injury of the plaintiff's mill site, nor to the injury of the water power developed by the plaintiff as stated in the report of the master.

And further excepts to said report,—

14. Because the master excluded the evidence offered by the plaintiff of the twenty-four hour flow, and of the twenty-four hour flow if used in ten hours, of said stream, in the driest month of an average year, at the plaintiff's dam.

15. Because the master excluded the evidence offered by the plaintiff to prove that the defendant had sufficient water and steam power for the present and future working of its mill without raising the waters of the stream so as to affect the plaintiff.

16. Because the master excluded the evidence offered by the plaintiff to prove that, in addition to the plaintiff's present water and steam power, it needed for the present and future working of its mill all the power that can be developed by its said lower dam.

17. Because the master refused to give the first ruling requested by the plaintiff.

18. Because the master refused to give the second ruling requested by the plaintiff.

19. Because the master refused to give the fifth ruling requested by the plaintiff.

20. Because the master gave the first ruling requested by the defendants.

115 21. Because the master gave the second ruling requested by the defendants.

22. Because the master gave the third ruling requested by the defendants.

23. Because the master gave the fourth ruling requested by the defendants.

24. Because the master gave the fifth ruling requested by the defendants.

25. Because the master gave the ninth ruling requested by the defendants.

26. Because the master gave the fourteenth ruling requested by the defendants.

27. Because the master gave the fifteenth ruling requested by the defendants.

28. Because the master gave the sixteenth ruling requested by the defendants.

29. Because the master gave the seventeenth ruling requested by the defendants.

30. Because the master gave the twentieth ruling requested by the defendants.

31. Because the master gave the twenty-seventh ruling requested by the defendants.

32. Because the master gave any of the rulings requested by the defendants.

33. Because the master ruled that the plaintiff is not entitled to relief.

HURLBURT, JONES & CABOT,
CHARLES L. GARDNER,
Plaintiff's Solicitors.

Filed Dec. 18, 1903.

116 Exceptions of Ludlow Manufacturing Company to Master's Report.

This defendant excepts to the report of the master in the following respects;—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement,

117 and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further excepts to said report because of the admission and consideration of the evidence, excepted to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this exception were based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the Manufacturing Company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11, 1900, because it appears that the Ludlow Manufact-

uring Company filed its plans and specifications for the erection of its said dam March 30, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report, on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures — making said development, and prose-
118 cuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail race, which began on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation*

for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

119 12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.
22. To the refusal of the master to give the thirteenth ruling requested by the defendants.
23. To the refusal of the master to give the eighteenth ruling requested by the defendants.
24. To the refusal of the master to give the nineteenth ruling requested by the defendants.
25. To the refusal of the master to give the twenty-first ruling requested by the defendants.
26. To the refusal of the master to give the twenty-second ruling requested by the defendants.
27. To the refusal of the master to give the twenty-third ruling requested by the defendants.
120 28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.
29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.
30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.
31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.
32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.
33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.
34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.
35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.
36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.
37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.
38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Attorneys.

Filed, Dec. 17, 1903.

121 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET ALS.

Exceptions of Ludlow Cordage Company to Master's Report.

This defendant excepts to the report of the master in the following respects:

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further excepts to said report because of the admission and consideration of the evidence, excepted to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this exception are based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development
122 of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11th 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11th, 1900, because it appears that the Ludlow Manu-

facturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes
123 quoted in said report on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the public statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail-race, which began on August 3d, 1899, because it appears in the stipulation of the parties that
124 immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the*

work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell dated April 30th, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30th, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to re-locate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

126 23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the refusal of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.

33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.

34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.

35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.

36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.

127 37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.

38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
(R.),
JAMES B. CARROLL,
(R.),
WALTER S. ROBINSON,
Its Att'ys.

Filed December 17, 1903.

[Endorsed:] 569 Eq. Otis Company *vs.* Ludlow Manufacturing Company *et al.* Exceptions of Ludlow Cordage Co. to master's report. 17 Dec. 1903.

128 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MFG. CO. ET AL.

Report of Case.

The above entitled case was heard by me for final decree upon the master's report and the objections and exceptions thereto of the plaintiff and defendants. I reserve and report the case and all questions of law therein including those raised by the objections and exceptions of each of the parties for the consideration of the full court. All exhibits introduced in evidence before the master were made a part of his report and are made a part of this report.

FRANCIS A. GASKILL, J. S. C.

Filed Jan. 4, 1904.

129 (Copy.)

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 20, 1904.

In the case of Otis Company *vs.* Ludlow Mfg. Co. *et al.*, pending in the superior court for the county of Suffolk,

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz.:

Bill dismissed with costs.

May 20, 1904.

By the court,

C. H. COOPER, Clerk.

Copy,
Att.

____ ____,
Clerk of Superior Court.

[Endorsed:] Brief statement of the grounds and reasons of the decision: The rulings of the master were correct. (See opinion.)

130 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court, April Sitting.

OTIS COMPANY
v.
LUDLOW MANUFACTURING COMPANY ET AL.

Final Decree after Rescript.

This cause came on *the* be further heard at this sitting, after the entry of the rescript from the supreme judicial court, and thereupon, upon consideration thereof and in accordance with said rescript, it is ordered, adjudged and decreed that the bill be, and hereby is, dismissed with costs in the sum of forty-one dollars and thirteen cents.

By the court,

GEORGE E. KIMBALL,
Ass't Clerk.

July 1, 1904.

131 UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Petition for Writ of Error.

To the honorable the justices of the superior court of the Commonwealth of Massachusetts holden at Boston within and for the county of Suffolk:

Your petitioner, The Otis Company, a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston show- unto your honors that heretofore, to wit, on the first day of July, A. D. 1904, at Boston in said county of Suffolk in said State of Massachusetts, in a suit in equity in said superior court in and for said county in which your petitioner was plaintiff and The Ludlow Manufacturing Company and The Ludlow Cordage Company, each a corporation organized under the laws of said Commonwealth and having its usual place of business in said

Boston, were defendants, a final judgment and decree was rendered against your petitioner, said court being the highest court of law or equity of the said State in which a decision in said suit could be had.

And your petitioner says that in said suit there was drawn in question the validity of a statute of and an authority exercised under the United States, and the decision aforesaid was against their validity; and in said suit there was drawn in question the validity of a statute of and authority exercised under said State, on
132 the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision aforesaid was in favor of such their validity; and in said suit there was drawn in question the construction of a clause of the Constitution of the United States, and the decision aforesaid was against the title, right, privilege and exemption specially set up and claimed by your petitioner under such clause of said Constitution; and a manifest error hath happened in said suit and judgment, to the great damage of your petitioner as appears by the assignments of error hereto annexed;

Wherefore your petitioner prays that a writ of error to the Supreme Court of the United States may issue in due form of law, to the end that said error shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf.

OTIS COMPANY,
By HURLBURT, JONES AND CABOT,
BOYD B. JONES,
Its Solicitors.

Petition filed and allowed July 9, 1904.

133 UNITED STATES OF AMERICA, State of Massachusetts, } ss:

OTIS COMPANY, Plaintiff in Error,
v.
LUDLOW MANUFACTURING COMPANY ET AL., Defendants in Error.

Assignment of Errors.

The Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston in the county of Suffolk in said Commonwealth, the plaintiff in the suit in equity lately pending in the superior court of said Commonwealth in and for the county of Suffolk, entitled Otis Company *vs.* Ludlow Manufacturing Company *et al.* defendants, wherein was drawn in question the validity of a statute of the State of Massachusetts, being chapter 190 of the Public Statutes of said State, reënacted chapter 196 of the Revised Laws of

Massachusetts, on the ground that said statute is repugnant to the 14th amendment of the Constitution of the United States and the due process clause thereof, being aggrieved by the rulings, final judgment and decree of said court in said cause, which said rulings, final judgment and decree are in favor of the validity of said statute and are in derogation of the rights of the plaintiff under the aforesaid provision of the Constitution of the United States, hereby assigns the following errors in said rulings, final judgment and decree, namely:—

1. Said superior court erred in dismissing the plaintiff's bill of complaint.

134 2. Said superior court erred in not ruling, deciding and decreeing that said Red Bridge dam was unlawfully erected by the defendant Ludlow Manufacturing Company in violation of the rights of the plaintiff.

3. Said superior court erred in not ruling, deciding and decreeing that the plaintiff was entitled to have said dam abated so as not to flow and injure the said mill site, mill, water power and property of the plaintiff.

4. Said superior court erred in not ruling, deciding and decreeing that the plaintiff was entitled to relief in equity against the erection and maintenance of the dam of the Ludlow Manufacturing Company, to wit, said Red Bridge dam.

5. Said superior court erred in ruling and deciding that said statute is not in conflict with the clause of the said 14th amendment to the Constitution of the United States forbidding any State to deprive any person of property without due process of law.

6. Said superior court erred in ruling and deciding that said statute does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

7. Said superior court erred in ruling and deciding that said statute and said occupation of said Red Bridge mill site and said erection and maintenance of said Red Bridge dam by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

8. Said superior court erred in ruling and deciding that said statute and said commencement of said occupation of said

135 Red Bridge mill site by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

9. Said superior court erred in ruling and deciding, that inasmuch as the taking of the property of the plaintiff under the authority of the aforesaid statute was under the police powers of said State, the plaintiff was not entitled to the title, right, privileges and immunities secured by the aforesaid clause of said 14th amendment to persons deprived of their property.

10. Said superior court erred in ruling and deciding that the erection and maintenance of said Red Bridge dam, under the authority of the aforesaid statute, by said Ludlow Manufacturing Company, so as to flow and injure said mill site, mill water power and property of the plaintiff, did not entitle the plaintiff to just compensation for the damages to the plaintiff for its property so taken as required by due process of law under the aforesaid 14th amendment.

11. Said superior court erred in ruling and deciding that said statute makes due provision for just compensation for the property of the plaintiff taken thereby and by authority thereof as required by due process of law under the aforesaid 14th amendment.

12. Said superior court erred in ruling and deciding that the provisions of said statute for the determination and payment of damages to the plaintiff for its property taken by virtue of or under the authority of said statute are a sufficient provision for just compensation to the plaintiff as required by due process of law under the aforesaid 14th amendment, and are not in conflict with said clause of said amendment.

136 13. Said superior court erred in ruling and deciding that the provisions of said statute for compensation to the plaintiff for damages sustained by the erection and maintenance of said Red Bridge dam, under the authority of said statute, are adequate to meet the requirements of said clause of the aforesaid 14th amendment, even though said statute does not require or provide just compensation to the plaintiff for the property taken.

14. Said superior court erred in ruling and deciding that the requirements of said statute, for the determination and payment of damages to the plaintiff for its property taken under and by authority of said statute, are a sufficient provision for just compensation to the defendants as required by due process of law under the aforesaid 14th amendment.

15. Said superior court erred in ruling and deciding that due process of law under said 14th amendment does not require that the act of appropriating or taking the plaintiff's property under the police power of the State should be clear and intelligible.

16. Said superior court erred in ruling and deciding that the occupation by the Ludlow Manufacturing Company of the Red Bridge mill site under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

137 17. Said superior court erred in ruling and deciding that the commencement of the occupation of said Red Bridge mill site by said Ludlow Manufacturing Company under the authority

of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been made or was to be made, was a valid appropriation of the water power, property and rights of the plaintiff whereby the Ludlow Manufacturing Company acquired a right to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

18. Said superior court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company, under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

19. Said superior court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company under the authority of said statute, although so ambiguous and unintelligible as
138 not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

20. Said superior court erred in not ruling and deciding that the said statute and the said acts of said Ludlow Manufacturing Company under the authority thereof deprived the plaintiff of its property without due process of law in violation of said clause of said 14th. amendment.

21. Said superior court erred in not ruling and deciding that said statute is repugnant to said clause of said 14th amendment, in that the provisions of said statute for compensation to the plaintiff for the property of which it was deprived under the authority of said statute are not reasonably certain and adequate.

OTIS COMPANY,
By HURLBURT, JONES AND CABOT,
BOYD B. JONES, Its Solicitors.

Filed July 9, 1904.

139 Bond on Writ of Error.

Know all men by these presents, that we, the Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston in said Commonwealth, as principal, and George F. Fabyan and Peder Olsen both of Brookline in the county of Norfolk in said Commonwealth, as sureties, *and* held and firmly bound unto the Ludlow Cordage Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston in the full and just sum of five hundred dollars to be paid to the said Ludlow Cordage Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of July in the year of our Lord one thousand nine hundred and four.

Whereas, lately in the superior court of the Commonwealth of Massachusetts, holden in Boston in the county of Suffolk on the first day of July, A. D. 1904, in a suit depending in said court between said Otis Company plaintiff and The Ludlow Manufacturing Company, a corporation duly organized under the laws of said Commonwealth, and having its usual place of business in said Boston, and the said Ludlow Cordage Company defendants, a final judgment and decree was rendered against the said Otis Company and the said Otis Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse
140 the judgment in the aforesaid suit, and a citation directed to the said Ludlow Manufacturing Company and the said Ludlow Cordage Company citing and admonishing them to be and appear at a Supreme Court of the United States at Washington on the twenty sixth day of July current.

Now, the condition of the above obligation is such, that if the said Otis Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OTIS COMPANY,
By CHARLES H. FISKE, Pres't. [SEAL.]
GEO. F. FABYAN. [SEAL.]
PEDER OLSEN. [SEAL.]

Sealed and delivered in presence of—
CHARLES R. WIGGIN.

Approved:
ALBERT MASON,
Chief Justice Superior Court.

Bond filed and allowed July 9, 1904.

141 Bond on Writ of Error.

Know all men by these presents, that we, the Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston in said Commonwealth, as principal, and George F. Fabyan and Peder Olsen both of Brookline in the county of Norfolk in said Commonwealth, as sureties, are held and firmly bound unto the Ludlow Manufacturing Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston in the full and just sum of five hundred dollars, to be paid to the said Ludlow Manufacturing Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of July in the year of our Lord one thousand nine hundred and four.

Whereas, lately in the superior court of the Commonwealth of Massachusetts, holden at Boston in and for the county of Suffolk on the first day of July, A. D. 1904, in a suit depending in said court between said Otis Company plaintiff and said Ludlow Manufacturing Company and the Ludlow Cordage Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston, defendants, a final judgment and decree was rendered against the said Otis Company and the said Otis Company having obtained a writ of
142 error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ludlow Manufacturing Company and said Ludlow Cordage Company citing and admonishing them to be and appear at a Supreme Court of the United States at Washington on the twenty sixth day of July current.

Now, the condition of the above obligation is such, that if the said Otis Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OTIS COMPANY,
By CHARLES H. FISKE, Pres't. [SEAL.]
GEO. F. FABYAN. [SEAL.]
PEDER OLSEN. [SEAL.]

Sealed and delivered in presence of—
CHARLES R. WIGGIN.

Approved:
ALBERT MASON,
Chief Justice of Superior Court.

Bond filed and allowed July 9, 1904.

143 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING CO. ET AL.

Stipulation of Parties.

The parties in the above entitled cause agree that the exhibits introduced in evidence before the master and made a part of the reservation and report of the case by the justice of the superior court for the consideration of the full court are more than two hundred in number, consisting of letters, deeds, plans, contracts and photographs; that so far as the said exhibits and parts thereof may be material to the Federal questions involved in the cause, the same are recited in the master's report; and that, excepting the recital thereof in the master's report and excepting Plaintiff's Exhibit Blue Print "Plan of land of Otis Company on Chicopee river dated February 1902 by J. K. Barker engineer" and excepting Defendants' Exhibit Colored Map of Defendants' Lands, they may be omitted from the transcript of the record to be sent up as a return to the writ of error issued upon the petition of the plaintiff and returnable to the Supreme Court of the United States.

HURLBURT, JONES & CABOT,
BOYD B. JONES,
Attorneys for Plaintiff.
WALTER S. ROBINSON,
Attorney for Defendants.

Filed July 23, 1904.

144 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MFG. CO. & Another.

Counsel for complainant Hurlburt, Jones & Cabot.
Counsel for respondent Brooks & Hamilton Carroll & McClintock (Springfield)

Copy of Docket Entries.

Bill entered, October 15, 1901.—Subpœna returnable November iss'd. Oct. 29, subpœna returned (1)—Oct. 31, plaintiff's motion for temporary injunction (2) denied without prejudice by decree (3)—

November 8, answer of Ludlow Mfg. Co. (4) of Ludlow Cordage Co. (5)—

1902, April 4.—Interlocutory decree referring cause to James R. Dunbar, Esq., special master (6)—May 21, plaintiff's motion to amend bill (7) by consent.—Plaintiff's amended bill (8) by consent. May 24. Answer of Ludlow Mfg. Co. to amended bill (9); of Ludlow Cordage Co. (10)—

1903, December 7.—Plaintiff's amended bill (11) by consent—Answer of Ludlow Cordage Co. to plaintiff's 2d amended bill (12) by consent; of Ludlow Mfg. Co. (13) by consent.

December 10 master's report (14)—December 17, exceptions to master's report of Ludlow Mfg. Co. (15); of Ludlow Cordage Co. (16)—December 18, plaintiff's exceptions to master's report (17)—

1904, January 4.—Report to supreme judicial court (18) Jan. 5, complainant's replication as of December 2, 1903 (19)—May 21, rescript S. J. C. "Bill dismissed with costs" (20)

145 1904, July 1.—Final decree after rescript (21)—

July 9, petition for writ of errors (22)—Assignment of error (23) Bond to Ludlow Cordage Company (24)—Bond to Ludlow Manufacturing Company (25)—Writ of error granted.

July 23, stipulation (26).

146 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

I Edw'd A. Willard, assistant clerk of the superior court for the said county of Suffolk, hereby certify that the copies hereto attached to the writ of error and the citation thereon—pages numbered in red ink 1 to 145 are true copies of the papers, records, of the assignment of errors and of all the proceedings in the equity cause, Otis Company vs. Ludlow Manufacturing Company and another, and annexed hereto and transmitted herewith is a copy of the opinion of the supreme judicial court of the Commonwealth of Massachusetts attested by Henry Walton Swift, reporter of decisions, and also the plaintiff's "plan of land of Otis Company on Chicopee river dated February 1902 by J. K. Barker engineer" and the colored map of defendants' lands mentioned in the master's report and the stipulation of the parties filed July 23, 1904.

In testimony whereof the clerk of said court being absent from the Commonwealth I have hereunto set my hand and affixed the seal of our superior court at Boston in the county of Suffolk, this twenty-seventh day of July A. D. 1904, by virtue of the statute in such case made and provided.

Seal of the Superior Court.

EDW'D A. WILLARD,
Assistant Clerk.

147 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, July 1, 1904.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Otis Company vs. Ludlow Manuf. Company *et al.* decided on the 20th day of May, 1904.

HENRY WALTON SWIFT,
Reporter of Decisions.

148 OTIS COMPANY
v.
LUDLOW MANUFACTURING COMPANY ET AL.

KNOWLTON, *C. J.*:

The plaintiff, a riparian proprietor upon the Chicopee river, has lately built across the stream a dam 19.29 feet high and three hundred and fifty-three feet long, with a length upon the rollway of two hundred and ten feet. Its expenditure for this development of power was two hundred and seventy-one thousand dollars. The water power is used to generate electricity, which is conducted about three-quarters of a mile up the stream to the plaintiff's factory at Three Rivers in Palmer, and there applied to the plaintiff's motors. This factory previously had been run in part by water power taken from the river further up, and in part by steam power.

The first mentioned defendant, The Ludlow Manufacturing Company, which will hereinafter be called the defendant, is also a riparian proprietor upon the river, and at a point two miles below the plaintiff's dam, it has lately built a dam whose height is fifty-one feet, whose length is eight hundred and eighty feet, and the length of whose rollway is three hundred feet. The defendant's expenditure for this development of power was eight hundred thousand dollars. This dam was built to enable the defendant to generate electricity to be conducted about four miles down the stream to furnish additional power for use at the defendant's old factories and at a new one in Ludlow. The defendant's dam sets back water upon the plaintiff's dam in such a way as very greatly to diminish
149 the water power there, and this bill is brought to enjoin the defendant from maintaining the dam and setting back the water.

The defendant became the owner in fee, in 1891, of certain land which includes the site of this present dam and the accompanying structures. In 1894, and again in 1898, it employed an engineer to take levels and make surveys, plans and soundings along and upon the property, for the purpose of determining whether or not it was practicable to erect a mill dam upon the site of the dam since completed, and he did the work for which he was employed. In January, 1899, the defendant employed one Ball, a civil and hydraulic

engineer of experience, and the contract with him recited that the defendant had determined to erect a mill dam on this site, and required him to proceed immediately to make surveys, cross-sectionings, soundings, plans and estimates necessary for the erection of the dam, with raceways, canals and other structures, and to do such other things as might be necessary for the proper development of the water power on this mill site. Immediately thereafter the defendant determined upon the present height and present site of the dam. Ball and the defendant's other agents and employees commenced without delay the work of preparation for building the dam and other structures, and making said development, and they prosecuted it and the work of construction of the dam and other structures continuously and with due diligence to the completion thereof within a reasonable time. The actual work of building the dam was begun on August 3, 1899, with the commencement of the construction of the tail race, and
150 within a reasonable time after making this beginning, the defendant completed the dam with all its appurtenances, and all the transmission lines and mechanism for the utilization of the water power in connection with a new mill which it had built near its other mills at Ludlow, and in connection with the other mills previously constructed, for the working of which this power was to be used. This work was completed and the power was ready to be utilized on October 16, 1901, and the mills were put in operation with the power, but the use of it was suspended by the bringing of this suit.

On the fourth day of April, 1900, the plaintiff determined to build a dam at the site of its present dam, and then began its preparatory work therefor, and prosecuted this work with due diligence until the eleventh day of August, 1900, when it began the work of excavating for the foundations of its dam, and from this latter date it continuously prosecuted the work of construction with due diligence to the completion within a reasonable time of its dam and all appurtenances necessary for the utilization of the power. This work was completed on July first, 1901.

Each part of the work of building its dam, the preliminary, the preparatory and the permanent work, was begun by the defendant before the corresponding part of the work of building the plaintiff's dam was begun by the plaintiff. The plaintiff's dam was completed first.

The principal question in the case is, What is the construction of the mill act as applied to these facts? The Pub. Sts. c. 190, s. 2 (R. L. c. 196, s. 2) is as follows: "No such dam shall be erected to the injury of a mill lawfully existing either above or below
151 it, nor to the injury of a mill site on the same stream on which a mill or mill dam has been lawfully erected and used, unless the right to maintain the mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill dam be hereafter erected or raised to the injury of any such

mill site which has been occupied by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied," etc.

The plaintiff contends that the defendant has violated that part of the statute which forbids the erection of a dam to the injury of an existing mill site on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of a mill site which has been occupied by the owner thereof, when the owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied.

The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the supply of power. The framers of it recognized the fact that such property, in many cases, could not be used judiciously by an owner for a short distance along the stream, without affecting the property of
152 other owners above and below, and preventing a like use of the stream for mill sites on other land. An enforcement by riparian proprietors of their rights at common law would often make it impossible for any of them to use water power effectively. Therefore, their personal interests, as well as the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of this peculiar kind of property. Our mill act is intended to meet this requirement in a way to promote the development of water power from streams for the benefit of individual owners no less than for that of the general public. Lowell *v.* Boston, 111 Mass., 454–464. The framers of the statute foresaw the possibility of a desire of two riparian proprietors owning lands near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for power would make it impracticable to maintain a mill in more than one of the two places. It was proper to provide for such cases by statute. Accordingly, we have the provision last above quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the better right. The legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right to use the water, there would have been an inducement to owners to engage in a race to see which could first get the water upon his wheel. In different ways the results of such a rule would have been harmful. The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed
153 by a completion of the work and the actual use of the water within a reasonable time. This is substantially the construction which was put upon the St. 1795, c. 74, in the case of Bigelow *v.* Newell, 10 Pick., 348, although that statute contained no special

provision touching this subject. The Rev. Sts. c. 116, s. 2, was in different language from the former act, and contained a prohibition of the erection of a dam to the injury of any mill site on the same stream. Under this statute the case of Baird *v.* Wells, 22 Pick., 312, was decided, in which it was held that the Revised Statutes had changed the law, and that the remedy of one who had begun his mill, but had not finished it until after another mill interfering with his had been completed, was by an assessment of damage under the mill act. Thereupon the legislature passed the St. 1841, c. 18, which is found in almost identical language in that part of the Pub. Sts., c. 190, s. 2, on which the present defendant relies. This enactment restored the rule stated in Bigelow *v.* Newell, 10 Pick., 348, which was held to have been changed by the Rev. Sts., c. 116, s. 2. Storm *v.* Manchaug Company, 13 Allen, 10–15. That this is the true construction of this statute is further indicated by the language used in other cases. Dean *v.* Colt, 99 Mass., 486–487. Fitch *v.* Stevens, 4 Met., 426–428. See also Washburn on Easements, 4th ed., 467–468. For general discussion of the law, see Fuller *v.* Chicopee Manufacturing Company, 16 Gray, 43. Fisk *v.* Framingham Manufacturing Company, 12 Pick., 68. Fitch *v.* Stevens, 4 Met., 426. Carey *v.* Daniels, 8 Met., 466. Gould *v.* Boston Duck Company, 13 Gray, 442. Smith *v.* Agawam Canal Company, 2 Allen, 355–356.

154 The plaintiff contends that the language of the statute, on which the defendant relies, applies only to owners on the stream below, and forbids their building a dam to the injury of an upper proprietor who has appropriated the power by beginning to build a dam which he completes within a reasonable time, and uses in connection with a mill, and that it does not apply to an owner on the stream above, who completes a dam, and seeks to have it remain with the outflow from the tail race undisturbed by back water from the dam of one who, in like manner, had previously appropriated the power at a point below. We are of opinion that this would be too narrow a construction of the provision. The building of a dam by an upper proprietor, for which he claims the common law right of a riparian owner to have the water flow down the stream without obstruction, would, if the claim were valid, be a great injury to the property of a proprietor below who had previously appropriated the power, but had been unable to complete his dam as soon as the upper dam was completed. In such a case, if the upper dam were protected as lawfully built under the mill act, in reference to a right to have the water flow freely away from it for the creation of power, the injury would be as great as it would be if a dam were built below which set back water upon a previously appropriated mill site above. The result would be that which is sought by the plaintiff in the present case, namely, a requirement that the dam below should be lowered so as not to set back water upon the upper mill. The reason for the enactment of the

155 statute seems to require us to hold it applicable to a proper appropriation of water power in a stream, whether above or

below the place where another subsequently begins to build, with the hope of preceding the other in the completion of his work.

This is in accordance with decisions in other States under similar statutes. Miller *v.* Troost, 14 Minn., 365–369. Kelley *v.* Natoma Water Company, 6 Cal., 105. Kimball *v.* Gearhart, 12 Cal., 27. Irwin *v.* Straight, 18 Nev., 436.

The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider at length the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has uniformly been affirmed. It is urged that the provision for the payment of damages is inadequate. This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain; but whatever may be the interference with the use of neighboring property by an appropriation of a mill site, it is not a taking under the right of eminent domain. Murdock *v.* Stickney, 8 Cush., 113. Hazen *v.* Essex Company, 12 Cush., 475. Lowell *v.* Boston, 11 Mass., 454–464. Turner *v.* Nye, 154 Mass., 579. Head *v.* Amoskeag Manufacturing Company, 113 U. S., 9. It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for an interference by statute with his right at common law to use the water of a stream without obstruction, where such interference is permitted in the regulation of the rights of different owners, as
156 necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff, in view of existing conditions. It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the Constitution. Boston and Roxbury Corporation *v.* Newman, 12 Pick., 467; Brickett *v.* Haverhill Aqueduct Company, 143 Mass., 394.

The plaintiff contends that the defendant was precluded from erecting a dam which would interfere with the right to use water power secured to the plaintiff as between it and one Metcalf, by a parol contract in writing with Metcalf, made on September 26, 1882, but not recorded. This agreement was made in connection with a proposed conveyance from Metcalf to the plaintiff of certain land on the river, and a proposed contemporaneous conveyance from the plaintiff to Metcalf of other land. In it each agreed with the other not to construct a dam for the development of his or its power, which should afford more than a prescribed number of feet fall that represented the extent of the power that was allowed to each, namely, 19.65 feet fall to the plaintiff and 21.32 feet fall to Metcalf. Conveyances of land were subsequently made by each to the other in pursuance of this agreement, and Metcalf afterwards con-
157 veyed his land to the Ludlow Cordage Company, a corporation which holds it, as the master has found, for the benefit

of the defendant as the equitable owner. The master also found that the defendant procured the sale from Metcalf to the Ludlow Cordage Company for its benefit, with full knowledge of this agreement.

We need not determine the effect of this contract in all particulars, for if we should assume in favor of the plaintiff that it was not merely a personal contract with Metcalf, but one which binds subsequent purchasers of this land who take notice of it, we are of opinion that it is of no effect in the present case. It was an agreement made in reference to the use of the lands then owned by the respective parties, and of those which would come to them subsequently through the proposed conveyances. If a purchaser of either lot, with notice of the agreement, would be bound not to use it in violation of the agreement, it does not follow that such a purchaser would be deprived of his right to use other lands which he might chance to own, in any lawful way. The land on which the defendant's dam was erected is nearly two miles further down the stream then the land which Metcalf owned, to which the agreement pertains. The dam was erected under the mill act, by virtue of the defendant's right as a riparian proprietor at the point where the mill site was established. The agreement was either a mere personal contract of Metcalf, or it was a contract connected with his land, which, in equity, would follow the land in the possession of a subsequent owner who took it with notice. If it follows the
158 land, it has no effect upon the rights of the defendant as the owner of other land below. The ruling of the master on this part of the case was right.

Bill dismissed with costs.

159 [Endorsed:] Otis Co. *vs.* Ludlow Manuf. Co. Certified copy of the opinion of the supreme judicial court. J. & K.

160 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Otis Company a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston in said county plaintiff and The Ludlow Manufacturing Company and The Ludlow Cordage Company, each a corporation duly organized under the laws of said Commonwealth and having a usual place of business in said Boston defendants, in a suit in

equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Otis Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-sixth day of July current, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the ninth day of July, in the year of our Lord one thousand nine hundred and four.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
Per BENJ. H. BRADLEE, Deputy Clerk.

Allowed by
ALBERT MASON,
Chief Justice Superior Court.

161 B.

COMMONWEALTH OF MASSACHUSETTS, *ss*:

And now, here, the judges of the superior court, make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Edw'd A. Willard, assistant clerk of said superior court, the clerk of said court being absent from the Com-

monwealth, by virtue of the statute in such case made and provided, have hereunto set my hand and the seal of said court this twenty-seventh day of July, A. D. 1904.

[Seal of the Supreme Court.]

EDW'D A. WILLARD,
Assistant Clerk.

162 L.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Ludlow Manufacturing Company and the Ludlow Cordage Company, each a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston, in the county of Suffolk, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, on the *twenty-sixth day of July current, pursuant to a writ of error filed in the clerk's office of the †superior court of the Commonwealth of Massachusetts within and for the county of Suffolk in said Commonwealth wherein The Otis Company, a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the superior court of the Commonwealth of Massachusetts, this ninth day of July, in the year of our Lord one thousand nine hundred and four.

ALBERT MASON,
Chief Justice Superior Court.

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*Not exceeding 30 days from the day of signing.
†Name of court to which writ of error is directed.

163 UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

BOSTON, July 13th, 1904.

I hereby certify that on the 13th day of July, 1904, I served the within citation by giving in hand to C. N. Wallace agent for the within named Ludlow Manufacturing Company at Boston who was in charge of its business a true and attested copy of this citation.

At the same time and place I gave to the said C. N. Wallace a like copy duly attested for the within named The Ludlow Cordage Company said Wallace being its vice-president who was in charge of its business.

J. H. WATERS,
Deputy United States Marshal.

[Endorsed:] United States marshal's office, room 101 P. O. building. Jul- 13 1904 Boston, Mass.
Endorsed: Hurlburt, Jones & Cabot. Boyd B. Jones.

164 UNITED STATES OF AMERICA:

Supreme Court of the United States.

THE OTIS COMPANY, Plaintiff in Error,
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Stipulation of Parties.

Because of the great expense of reproducing in the printed record the two large maps which are a part of the transcript of the record in the above entitled case, the parties thereto agree that said maps need not be reproduced in the printed record, but may be referred to by counsel in their argument and by the court.

WM. H. MOORE,
For Pl'f in Error.
FREDERICK H. NASH,
For Defendants in Error.

165 [Endorsed:] File No. 19,434. Supreme Court U. S. October term, 1905. Term No. 73. The Otis Company, pl'ff in error, *vs.* The Ludlow Manuf'g Co. *et al.* Stipulation to omit maps in printing record. Filed July 20th, 1905.
Endorsed on cover: File No. 19,434. Massachusetts superior court. Term No. 73. The Otis Company, plaintiff in error, *vs.* The Ludlow Manufacturing Company and The Ludlow Cordage Company. Filed August 6th, 1904. File No. 19,434.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 73.

THE OTIS COMPANY,
PLAINTIFF IN ERROR,

v.

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW CORDAGE COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Brief on Behalf of the Plaintiff in Error.

Statement of the Case.

This case comes before this court on a writ of error to the Superior Court of the state of Massachusetts, to review a final decree of that court in favor of the defendants in a suit in equity in which the plaintiff in error was plaintiff and the defendants in error were defendants. The Ludlow Manufacturing Company is referred to in this brief as the defendant. The parties to the suit are

manufacturing corporations organized under the laws of that state.

The plaintiff's bill of complaint was entered in the Superior Court of that state on the 15th day of October, 1901, to restrain the defendants from completing the erection of a dam across the Chicopee river, a non-navigable stream, and thereby flowing and injuring the land, mill-site, dam, water-mill, and water power of the plaintiff above and on the same stream.

Answers were filed by the defendants in error and issue joined.

The case was referred by the Superior Court to a master, who reported the facts, and ruled as a matter of law that the plaintiff was not entitled to relief.

As will be shown hereinafter by specific reference to the record, the facts, as found by the master, are as follows: —

The plaintiff, an owner of a large parcel of land, including the banks and bed of a non-navigable stream, on July 1, 1901, completed thereon the development of the natural fall of that stream on the land by a dam (called the lower dam), erected wholly on its land, which flowed only its land and did not violate the common law rights of any one, and on that date raised the waters of the stream by that dam and used them in working its water-mill, and applied electrical power thereby generated to driving the machinery of an ancient cotton mill of the plaintiff above and on the same site. The defendant on that date had a dam, called the Red Bridge dam, in process of construction across the river two miles below the plaintiff's dam, which dam of the defendant at no time before the 16th day of the following October was sufficiently advanced in construction to raise the waters of the

river or to flow or affect the land, mill, or water power of the plaintiff, but which when completed would flood the plaintiff's land and ruin the plaintiff's lower mill-site, and said water-mill and water power. The first occupation by the defendant of its mill-site was August 3, 1899, antedating any similar occupation by the plaintiff of its lower mill-site, but this occupation was of so ambiguous a character as not to indicate, either then or until long after the plaintiff's occupation of its lower mill-site, either the height of the dam which the defendant intended to build, or the extent to which it would set the waters back, or even that it would in any way affect or interfere with the plaintiff's enjoyment of its property. The defendant, even after it knew the plaintiff was considering the building of its dam, intentionally concealed and withheld from the plaintiff information or knowledge that the defendant's dam, when completed, would flow and injure the plaintiff's land, mill-site, mill, and water power.

As will be shown by specific reference to the record, the Superior Court, in accordance with the opinion of the Supreme Judicial Court, reported in the case at bar *Otis Co.* v. *Ludlow Mfg. Co. et al.*, 186 Mass. 89 (Record, p. 112), entered a decree in favor of the defendants on the ground that the flowing by the defendant was authorized by the Mill Act of that state, Pub. Sts. c. 190, and that that act was not repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States. (Record, pp. 102, 103, 112.)

The provisions of the Mill Act involved in the question of its constitutionality are the following sections of Public Statutes, c. 190: —

> "Sect. 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it,

upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

"Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

. . . . . .

"Sect. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

"Sect. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

. . . . . .

"Sect. 16. If they [the jury] find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

. . . . . .

"Sect. 18. They [the jury] shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

"Sect. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office.

"Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and

interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

"Sect. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner and occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

"Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

"Sect. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars.

"Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it.

The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

. . . . . .

"Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter."

The state constitution contains the following provisions: —

"And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Constitution of Mass., part 1, art. X.

"And further full power and authority are hereby given and granted to the said general court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth and for the government and ordering thereof and of the subjects of the same."

Constitution of Mass., part 2, c. 1, sec. 1, art. IV.

In advance of the discussion of this case, we venture to express the belief that a careful examination of the Mill Act in question will lead to the conclusion that, as interpreted by the state court in the case at bar in palpable disregard of a long uninterrupted line of its decisions, this Mill Act is clearly unconstitutional, within the Federal rule and even within the decisions of those state courts by which somewhat similar statutes have been upheld.

The facts in detail are as follows: —

At the date of the filing of the plaintiff's bill, the plaintiff was the owner of the land therein described (Bill of Complaint, Record, p. 21; Master's Report, Record, p. 41), including the bed of a mill stream called the Chicopee river, which flows through said land. (Master's Report, Record, pp. 42–44; Exhibit marked "Plan of land of Otis Company, by J. K. Barker.")

There was then on this land a cotton mill of the plaintiff, called the upper mill, which it had owned and operated since 1872 by use of water power created by a dam at said mill, called the upper dam, supplemented since 1891 by steam power. (Master's Report, Record, pp. 33, 41.)

And on the same land three fourths of a mile below the cotton mill there was then the plaintiff's lower dam, which is the one flowed by the defendant's dam, and which is the one hereinafter referred to as plaintiff's dam. (Master's Report, Record, p. 41.)

The plaintiff's dam is built wholly on plaintiff's land across a mill stream (Master's Report, Record, p. 33; Exhibit marked "Plan of land of Otis Company, by J. K. Barker"), and flows only the land of the plaintiff (Master's Report, Record, pp. 40, 41), including land formerly a part of a highway which was relocated and discontinued

September 4, 1900 (Master's Report, Record, pp. 40, 65, 76), and conveyed to the plaintiff. (Master's Report, Record, p. 42.)

The plaintiff's dam violated no common law rights of the defendants. (Master's Report, Record, p. 76.)

The elevation of the plaintiff's dam is 278 and 29/100 feet; the height thereof is 19 and 29/100 feet; and the net ordinary working head not less than 18 nor more than 18 and 56/100 feet. (Master's Report, Record, pp. 32, 33.)

In the five wettest months of the average year the flow of the stream, with a net head of 18 feet afforded by this dam, furnishes 1952 horse power for a run of twenty-four hours. (Master's Report, Record, p. 34.)

The plaintiff's dam and water-mill connected therewith, with water wheels and electrical machinery installed, constituting one unit of power, was completed and put in use on the 1st day of July A.D. 1901. From that time, with immaterial exceptions, the waters of said stream have been kept raised by said dam and used in working said water wheels and generating electrical power transmitted to, and used in working, the plaintiff's cotton mill above. The water-mill is constructed for the installation of three additional similar units which will utilize all the water power developed. (Master's Report, Record, p. 34.)

The cost of the lower dam and water-mill therewith connected was $271,000. (Master's Report, Record, p. 38.)

The plaintiff needs, for the present and future working of its cotton mill, all water power developed by said dam. (Master's Report, Record, p. 74.)

"On Sept. 26, 1882, the plaintiff was operating its

cotton mill, and owned the entire south bank of the river from this mill to the Shearer lot, which is marked No. 7 on the plan dated February, 1902, hereinafter mentioned, and Metcalf owned the south bank below the Shearer lot, called the Sprague lot, and marked on said plan 'Metcalf privilege,' and at that time the Otis Company, the plaintiff, owned the north bank, being lot No. 1 on said plan extending from said dam to the Barker lot, No. 5 on said plan, and Metcalf owned the north bank just below the Barker lot, called the Green lot; the Otis Company at the same time owned to the thread of the stream on both sides between its upper mill dam and the Barker lot, and owned to the thread of the stream on the south side of the river between lot No. 1 and the lower line of the Barker lot, and from the lower line of the Barker lot to the Shearer lot the Otis Company owned to the thread of the stream on both sides, but did not own the bank on the north side of the river, and it did not then own the land conveyed to it by Honorah A. Dunn, on a part of which a portion of its lower dam is erected." (Master's Report, Record, p. 42. See copy of plan annexed to this brief.)

The plaintiff in 1882, in pursuance of an agreement in writing with Metcalf, acquired title to the Shearer lot and conveyed to Metcalf, by deed dated March 14, 1883, the part of the Shearer lot lying below the stake mentioned in said agreement; and Metcalf at the same time conveyed to the Otis Company, in pursuance of said agreement, all that portion of the Green lot on the other side of the river, lying above a point in range with said stake, being lot No. 6 in said plan. (Master's Report, Record, pp. 43, 44.)

The land acquired from Metcalf, with what the plaintiff then owned and land shortly after conveyed to it by Barker and by Dunn, comprises the plaintiff's land described in its bill of complaint.

Said agreement provided that —

> "Sixth. Said Metcalf or his assigns shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100." (Master's Report, Record, p. 44.)

Or, in other words, that neither party should build a dam which would interfere with the natural fall of the stream through the other's land. (Master's Report, Record, p. 44.)

In 1898 the plaintiff, needing additional power at its cotton mill, considered the development of the lower fall, and an expert whom it employed in that behalf advised that a further utilization of the fall developed by the upper dam would supply the power then required, but expressed the opinion that the lower fall was a very valuable property in view of the future requirements of the plaintiff's plant. (Master's Report, Record, p. 62.)

In March and April, 1900, the plaintiff had the development of its lower privilege under consideration. (Master's Report, Record, p. 64.)

The plaintiff determined to build its dam on the 4th day of April, 1900, and began the work of excavating for the foundations of this dam on the 11th day of August,

1900. It prosecuted both the preparatory work and construction of the dam and water-mill with due diligence until the same were completed, and the power developed was actually applied to working its cotton mill on July 1, 1901. (Master's Report, Record, pp. 34, 40.)

To prevent its water rights from being grabbed by the defendant, the plaintiff at first determined to build an inexpensive dam which it could complete very quickly. (Master's Report, Record, pp. 70, 71, 73.)

We now come to the history of the defendant's dam, called the Red Bridge dam. It will be interesting to observe the facts upon which it relies for a taking by due process of law.

In 1898, prior to October, the defendant had determined to erect a dam on the site of the Red Bridge dam, two miles below the plaintiff's dam, but had not determined on the height thereof. (Master's Report, Record, pp. 37, 38.)

On December 3, 1898, the defendant purchased the premises conveyed by the plaintiff to Metcalf as aforesaid and paid him therefor the sum of $15,000, taking the deed, however, in the name of the Ludlow Cordage Company. (Master's Report, Record, p. 58.)

At that time the defendant owned the land between the site of the Red Bridge dam and the premises so purchased. (Master's Report, Record, p. 41.)

> "The deed from Metcalf to the Ludlow Cordage Co. was procured by the Ludlow Manufacturing Co. The land described therein was purchased by the Ludlow Manufacturing Co. for its own purpose, namely, the development of additional water power, and paid for with its own funds. The existence

and terms of said agreement between the Otis Co. and Metcalf was, at the time of procuring said deed, known to the Ludlow Manufacturing Co., and this deed was taken by the Ludlow Manufacturing Co. in the name of the Ludlow Cordage Co., in part for the purpose of concealing the true ownership of said property and evading the obligations imposed upon Metcalf and his assigns by the 6th article of the Metcalf agreement. The Ludlow Manufacturing Co. is in equity the real owner of said property and retains title in the name of Ludlow Cordage Co. for the purposes above stated." (Master's Report, Record, pp. 47, 48.)

False entries showing the Cordage Company indebted to the defendant for $2000, on account of the land conveyed by Metcalf to the Cordage Company, which was not flowed by the dam, were made by the defendants in their books. (Master's Report, Record, pp. 59, 60.)

In January, 1899, the defendant, having determined to erect a dam on the present site of the Red Bridge dam, employed a civil engineer to make the preparatory surveys, plans, and estimates. (Master's Report, Record, pp. 38, 75.) Immediately thereafter the engineer commenced the work of preparing for the building of the dam and development of the water power. (Master's Report, Record, p. 38.)

On the 3d day of August, 1899, the defendant began the construction of said dam by beginning the construction of the tail race thereof (Master's Report, Record, pp. 38, 75), and the excavation of the tail race, commenced on August 3, 1899, was the first act of occupation by the defendant of its mill-site (Master's Report, Record, pp. 38,

75); but this excavation and the defendant's occupation of its mill-site had progressed on April 4, 1900, only to the extent of making, as part of the tail race, an excavation from 8 to 10 feet deep, 25 to 30 feet long, 12 to 15 feet wide, and of stripping some of the soil on the side of the proposed dam. The stripping was commenced on March 30, 1900, and was not sufficient to indicate to a person not an engineer experienced in the construction of dams, the height of the proposed dam or the extent to which it would set back the water of the stream. (Master's Report, Record, p. 64.)

As late as September 20, 1900, no part of the defendant's construction was above the natural surface of the ground, except that soil had been thrown up three feet on one side of a trench and eight feet on the other. (Master's Report, Record, p. 66.)

This work did not indicate even then that the plaintiff's land would be flowed.

A representative of the defendant, early in 1899, made inquiries of a representative of the plaintiff as to the boundary line between the Metcalf land and the plaintiff's land. (Master's Report, Record, p. 61.)

On March 24, 1900, and again on the 7th day of the following April, a representative of the defendant was informed by a representative of the plaintiff that the plaintiff was thinking of developing its water power on its lower privilege. (Master's Report, Record, p. 64.) The defendant intentionally refrained from informing the plaintiff that the defendant intended to build a dam which would flow the plaintiff's land until April 11, 1900, when, in reply to a direct inquiry (made April 7, 1900) as to how far the defendant intended to flow back, the defendant sent its engineer, who informed the plaintiff that the Red

Bridge dam, when completed, would flow and destroy the plaintiff's lower privilege. It was the purpose and intention of the defendant not to communicate or inform the plaintiff of the defendant's intention to build a dam which would flow the plaintiff's land, and this purpose and intention were not abandoned until April 11, 1900. (Master's Report, Record, pp. 62, 63.)

Neither the plaintiff nor any employee thereof had knowledge or notice prior to April 4, 1900, that any one intended to erect a dam which would flow its land or injuriously affect its lower privilege (Master's Report, Record, p. 63), and the first knowledge or notice was merely that which might or would be inferred from a letter of April 3, 1900, communicating the approximate intended height of the defendant's dam, received from one Barker, who had accidentally seen plans of it, and thought from the height thereof that it might injuriously affect the plaintiff. (Letter of Barker, Master's Report, Record, p. 63.)

The defendant, on the 16th day of October, 1901, completed the erection of the dam on its land across said stream at a point two miles below the plaintiff's dam (Master's Report, Record, pp. 36, 38, 42), and of the water-mill therewith connected, with an installation of water wheels and electrical machinery, all at a cost of $800,000. (Master's Report, Record, pp. 36, 38, 42.)

This dam has an elevation of 272.61 feet; a height of 51 feet; a roll way of 300 feet, and an ordinary net working head of 50 feet. The elevation of the bottom of its gate opening is 260.61 feet, and the bottom of the canal is from 7½ to 10 inches higher than the surface of water on the tail race of the plaintiff's dam when the plaintiff's wheels are running. (Master's Report, Record, pp. 36, 39.)

In the five wettest months of an average year the flow of the stream at the defendant's dam, under a head of 50 feet, would give a twenty-four hour run of 5485 80/100 horse power. (Master's Report, Record, p. 37.)

The defendant's dam flows the waters of the stream back on the land of the plaintiff between the plaintiff's dam and the lower boundary of its land, *flooding the land and also interfering with the working of the water wheels of the plaintiff, and diminishing — in fact, ruining — the power development of the plaintiff*, and a reference to the plan will show that but for the plaintiff's lower dam the defendant's dam would flow the plaintiff's land far above it. With the water raised to the crest of the defendant's dam, the plaintiff loses at least 12 88/100 feet of the fall on its land which it has developed wholly on its land.

The gross head remaining at plaintiff's dam without a flashboard, when water is raised at defendant's dam, is 5 68/100 feet. (Master's Report, Record, pp. 35, 36.)

In other words the defendant has appropriated a portion of the plaintiff's land and 12.88 feet of the developed natural fall of the stream on the plaintiff's land.

The development of the defendant was to be used to generate electricity to work the defendant's new mill, devoted to the manufacture of fabrics, about four miles below its dam. (Master's Report, Record, pp. 36, 39, 42.)

> "The Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam.

"The plaintiff completed its said dam before the Ludlow Manufacturing Company completed its said dam.

"The plaintiff raised the waters of said river, by its said dam as aforesaid, and used them in working the water wheels of said unit as aforesaid, and by electrical power generated and transmitted as aforesaid, worked said portions of its said cotton mill as hereinbefore stated before the completion of the defendant's said dam and before the waters of said river were raised by the defendant's said dam." (Master's Report. Record, p. 40.)

Upon these facts the plaintiff claimed, —

"1. That said clause of the statute [Pub. Sts. c. 190, sec. 2] does not authorize the owner of a mill-site, who has first commenced to occupy it as such, by first preparing to erect, or by first commencing to erect, a mill-dam, and who builds and puts in operation a mill in accordance with said clause, to complete the erection of such a dam and thereby raise the waters of the stream so as to flow and injure an upper mill-site on said stream, the owner of which upper mill-site had first completed thereon the erection of a mill-dam and thereby raised the waters of said stream and used them in working a water-mill before the lower dam was completed or used to raise said water.

"2. That if said section 2 does authorize the owner of such lower mill-site to flow and injure an upper mill-site, under the circumstances stated in the last stated request, then said section is in violation of the Constitution of the United States and of the Constitu-

tion of Massachusetts." (Plaintiff's Requests 1, 2, Master's Report, Record, p. 76.)

The defendant claimed that the facts found by the master constituted a valid prior appropriation by it of the water power of the plaintiff (Master's Report, Record, p. 76), and that the plaintiff was not entitled to relief, and made the following requests: —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege.

"2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill-site as such.

"3. Prior to the time the Otis Company commenced the erection of its dam, the mill-site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company.

. . . . . .

"36. Upon the pleadings and the evidence the plaintiff is not entitled to any relief." (Requests of Defendant 1, 2, 3, 36, Record, pp. 76, 80.)

The plaintiff objected and excepted to the master's report because the master did not find or rule as follows, ~~as requested by plaintiff~~: —

"1. Said Red Bridge dam, erected by the Ludlow Manufacturing Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water-mill of the plaintiff on the same stream.

"2. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the mill-site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

"3. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill-site of the defendants or either of them existing on the same stream.

"4. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill-site of the defendants or either of them occupied as such by them or either of them.

"5. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

. . . . . .

"7. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water-mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill-site of an upper proprietor and his existing water-mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time, — such provision is contrary to the 14th Amendment of

the Constitution of the United States and void, in that it authorizes depriving a person of his property without due process of law." (Record, pp. 81, 91, 92.)

The plaintiff further objected and excepted to the master's report—

Because the master gave the first ruling requested by the defendants; viz., —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege." (Record, pp. 76, 80, 83, 93.)

Because the master gave the second ruling requested by the defendants; viz., —

"2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill-site as such." (Record, pp. 76, 80, 83, 93.)

Because the master gave the third ruling requested by the defendants; viz., —

"3. Prior to the time the Otis Company commenced the erection of its dam, the mill-site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company." (Record, pp. 76, 80, 83, 93.)

"Because the master ruled that the plaintiff is not entitled to relief." (Record, pp. 80, 94.)

The Superior Court reserved the case on the master's report for the determination of the Supreme Judicial Court, and on the 1st day of July A.D. 1904, judgment was entered in the Superior Court in accordance with the opinion of the Supreme Judicial Court. (Record, pp. 102, 103, 112.)

And thereupon the plaintiff in error sued out this writ in error. The assignment of errors, twenty-one in number, present the question —

Does the Mill Act as interpreted by the state court violate the due process of law clause of the 14th Amendment of the Constitution of the United States?

Assignment of Errors.

The following errors were assigned (Record, pp. 104–107): —

"1. Said Superior Court erred in dismissing the plaintiff's bill of complaint.

"2. Said Superior Court erred in not ruling, deciding and decreeing that said Red Bridge dam was unlawfully erected by the defendant Ludlow Manufacturing Company in violation of the rights of the plaintiff.

"3. Said Superior Court erred in not ruling, deciding and decreeing that the plaintiff was entitled to have said dam abated so as not to flow and injure the said mill-site, mill, water power and property of the plaintiff.

"4. Said Superior Court erred in not ruling, deciding and decreeing that the plaintiff was entitled to relief in equity against the erection and maintenance of the dam of the Ludlow Manufacturing Company, to wit, said Red Bridge dam.

"5. Said Superior Court erred in ruling and deciding that said statute [Pub. Sts. c. 190] is not in conflict with the clause of the said 14th Amendment to the Constitution of the United States forbidding any state to deprive any person of property without due process of law.

"6. Said Superior Court erred in ruling and deciding that said statute does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"7. Said Superior Court erred in ruling and deciding that said statute and said occupation of said Red Bridge mill-site and said erection and maintenance of said Red Bridge dam by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"8. Said Superior Court erred in ruling and deciding that said statute and said commencement of said occupation of said Red Bridge mill-site by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"9. Said Superior Court erred in ruling and deciding, that inasmuch as the taking of the property of the plaintiff under the authority of the aforesaid statute was under the police powers of said state, the plaintiff was not entitled to the title, right, privileges and immunities secured by the aforesaid clause of said 14th Amendment to persons deprived of their property.

"10. Said Superior Court erred in ruling and decid-

ing that the erection and maintenance of said Red Bridge dam, under the authority of aforesaid statute, by said Ludlow Manufacturing Company, so as to flow and injure said mill-site, mill, water power and property of the plaintiff, did not entitle the plaintiff to just compensation for the damages to the plaintiff for its property so taken as required by due process of law under the aforesaid 14th Amendment.

"11. Said Superior Court erred in ruling and deciding that said statute makes due provision for just compensation for the property of the plaintiff taken thereby and by authority thereof as required by due process of law under the aforesaid 14th Amendment.

"12. Said Superior Court erred in ruling and deciding that the provisions of said statute for the determination and payment of damages to the plaintiff for its property taken by virtue of or under the authority of said statute are a sufficient provision for just compensation to the plaintiff as required by due process of law under the aforesaid 14th Amendment, and are not in conflict with said clause of said Amendment.

"13. Said Superior Court erred in ruling and deciding that the provisions of said statute for compensation to the plaintiff for damages sustained by the erection and maintenance of said Red Bridge dam, under the authority of said statute, are adequate to meet the requirements of said clause of the aforesaid 14th Amendment, even though said statute does not require or provide just compensation to the plaintiff for the property taken.

"14. Said Superior Court erred in ruling and deciding that the requirements of said statute, for the determination and payment of damages to the plain-

tiff for its property taken under and by authority of said statute, are a sufficient provision for just compensation to the defendants as required by due process of law under the aforesaid 14th Amendment.

"15. Said Superior Court erred in ruling and deciding that due process of law under said 14th Amendment does not require that the act of appropriating or taking the plaintiff's property under the police power of the state should be clear and intelligible.

"16. Said Superior Court erred in ruling and deciding that the occupation by the Ludlow Manufacturing Company of the Red Bridge mill-site under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

"17. Said Superior Court erred in ruling and deciding that the commencement of the occupation of said Red Bridge mill-site by said Ludlow Manufacturing Company under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been made or was to be made, was a valid appropriation of the water power, property and rights of the plaintiff whereby the Ludlow Manufacturing Company acquired a right to

thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

"18. Said Superior Court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company, under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

. . . . . .

"20. Said Superior Court erred in not ruling and deciding that the said statute and the said acts of said Ludlow Manufacturing Company under the authority thereof deprived the plaintiff of its property without due process of law in violation of said clause of said 14th Amendment.

"21. Said Superior Court erred in not ruling and deciding that said statute is repugnant to said clause of said 14th Amendment, in that the provisions of said statute for compensation to the plaintiff for the property of which it was deprived under the authority of said statute are not reasonably certain and adequate."

Argument.

Under the main question — does the Mill Act as interpreted by the state court violate the due process of law clause of the 14th Amendment of the Constitution of the United States — the plaintiff submits the following propositions: —

I. In Massachusetts a proprietor of land through which a natural watercourse flows has a common law right, as owner of such land, to the natural flow of the stream through his land, its descent and all force to be derived therefrom, for any hydraulic purposes to which he may see fit to apply it.

II. The right of the plaintiff to use its land for general purposes, and its right as a riparian proprietor to make use of the stream for hydraulic purposes, are property rights within the meaning of the due process of law clause of the 14th Amendment.

III. Whether an interference with property rights is the taking of property within the due process of law clause of the 14th Amendment, is a Federal and not a local question.

IV. Flowing the land of another under the authority of a Mill Act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the beneficial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause entitling the owner to compensation.

V. The Mill Act (Mass. Pub. Sts. c. 190), printed on page 153 of this brief, authorizes depriving a person of property without due process of law within the meaning of the 14th Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of

occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as to utterly fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected.

VI. This Mill Act also violates the 14th Amendment because it does not make adequate provision for just compensation to the owner thereof for property taken under the authority of said act.

VII. The Massachusetts Mill Act violates the 14th Amendment because it authorizes the taking of private property for private purposes.

The Supreme Judicial Court of Massachusetts, in deciding in the case at bar that the statute was constitutional, made the following inaccurate statement of the plaintiff's contention:—

> "The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider at length the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has uniformly been affirmed. It is urged that the provision for the payment of damages is inadequate. *This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain;* but whatever may be the interference with the use of neighboring property by an appropriation of a mill-site, it is not a taking under the right of eminent domain." (Opinion of the Supreme Judicial Court, Record, p. 116.)

In order to avoid any misapprehension on this point we

beg leave to refer to a duly certified copy of the plaintiff's brief in the state court on file with the clerk of this court, and to propositions of the plaintiff stated on page 3 thereof, as well as to the plaintiff's claim on following pages, that the question whether an interference with a landowner's rights is a taking of property within the meaning of the 14th Amendment is a Federal one, and that such taking "must be by due process of law whether it be under the police power of a state or by right of eminent domain for strictly public purposes" (State Court Brief, p. 34); and further, on pages 35 and 36 of the brief, that the 14th Amendment requires that such taking should be clear and intelligible.

Whether the state court considered or failed to consider the Federal questions raised by the record is immaterial. These questions were in fact presented by the record and argued by the plaintiff, and the judgment in the case, adverse to the plaintiff, necessarily involved a decision either that there had been no taking of the plaintiff's property in a Federal sense or that there was within the meaning of the 14th Amendment a valid taking under a statute making an adequate provision for compensation.

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein.

> *Erie R.R. Co.* v. *Purdy*, 185 U.S. 148.
> *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U.S. 552.

If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have

given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell v. *Brunswick Co.*, 150 U.S. 433.

In the case at bar, as in *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.*, 142 U.S. 254, the state court could not have reached a conclusion adverse to the plaintiff in error without holding either that the rights taken were not the property of the plaintiff, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law.

I.

In Massachusetts a proprietor of land through which a natural watercourse flows has a common law right, as owner of such land, to the natural flow of the stream through his land, and its descent, and all force to be derived therefrom, for any hydraulic purposes to which he may see fit to apply it.

If the Chicopee river were a navigable stream, the plaintiff would be entitled to relief, for the Mill Act authorizes the erection and maintenance of a dam only across non-navigable streams.

Murdock v. *Stickney*, 8 Cush. 113.

The Chicopee river is a small non-navigable stream emptying into the Connecticut river, also a non-navigable stream.

Bardwell v. *Ames*, 22 Pick. 333.

The state court in the case at bar put its decision on the ground that the stream was one within the scope of the

Mill Act; that the Mill Act was constitutional, and that the defendant's dam was authorized by it. The state court takes judicial notice of the non-navigability of a stream within the limits of the state.

Commonwealth v. *Chapin*, 5 Pick. 199–201.
Commonwealth v. *King*, 150 Mass. 221.
Olive v. *State of Alabama*, 86 Ala. 88.

The finding of the master that the plaintiff owns to the thread of the stream on both sides, *i.e.*, the bed and banks, is a finding that the stream is non-navigable.

A reference to the cases will show that the owner of land through which a non-navigable stream flows owns the bed of the stream, and has the right to the exclusive use of the waters of the stream, as it flows through the land, for domestic and hydraulic purposes; that no one has a right to fish in the stream within the limits of his land; that no one has a right to pollute the waters of the stream so as to render them unfit for his use as they flow through his premises; that no one has a right to divert the waters of the stream from his premises, nor to back the waters of the stream so that they will flow his land or interfere with the use of the fall or force of the stream through his land. These rights are private rights, for the infringement of which, by any person, the riparian owner may maintain an action for damages — or in proper cases a bill in equity for an injunction, or in cases of an obstruction in the stream on the land of another, causing the water to flow back upon his premises, he may enter upon such other's land and abate the nuisance thereby occasioned.

The right of each proprietor, therefore, is equal at common law, not in the sense that it is free to any one of them by first erecting a dam to flow or use the land of another,

or by first making a use of the waters of the stream to acquire an exclusive right of user, but in the sense that the owner of each parcel of land is entitled to use on his land the waters of the stream without diverting the stream from other owners or flowing it back upon their lands or interfering with their use by polluting it. These rights of the riparian owner are just as much the property of the owner as the land itself of which it is a part, and to the same, and no greater extent, are subject to the right of eminent domain and the exercise of the police powers.

A reference to the cases will fully support the foregoing statements.

In Massachusetts a river above the ebb and flow of the tide is a non-navigable river, and a riparian proprietor thereon owns to the thread of the stream, subject to the right of the public to pass in boats if the river be in fact boatable, and, like other property, subject to a constitutional exercise of the police powers of the state.

Ingraham v. *Wilkinson*, 4 Pick. 268–271.
Commonwealth v. *Chapin*, 5 Pick. 199–201.
Rowe v. *Granite Bridge*, 21 Pick. 344.
Hopkins Academy v. *Dickinson*, 9 Cush. 544.
McFarlin v. *Essex Co.*, 10 Cush. 304–309.
Commonwealth v. *Vincent*, 108 Mass. 441, 447.

A riparian proprietor on a non-navigable stream has the exclusive private right to the use of its waters as they flow through his land, and such right is parcel of the land and as sacred as the right to the soil over which they flow.

Watuppa Reservoir Co. v. *Fall River*, 147

Mass. 548, at 560, 561; (s.c.) 154 Mass. 305.

Fitch v. *Stevens*, 4 Met. 426.

King v. *King*, 7 Mass. 496.

Ingraham v. *Wilkinson*, 4 Pick. 268–271.

Commonwealth v. *Chapin*, 5 Pick. 199.

Bardwell v. *Ames*, 22 Pick. 333.

Williams v. *Nelson*, 23 Pick. 141, 142.

Johnson v. *Jordan*, 2 Met. 234, 239.

Pitts v. *Lancaster Mills*, 13 Met. 156, 158.

Knight v. *Wilder*, 2 Cush. 199, 208.

Commonwealth v. *Alger*, 7 Cush. 53, 97.

Bates v. *Weymouth Iron Co.*, 8 Cush. 548.

Elliott v. *Fitchburg R.R.*, 10 Cush. 191.

McFarlin v. *Essex Co.*, 10 Cush. 304.

Hill v. *Sayles*, 12 Cush. 454.

Russell v. *Russell*, 15 Gray, 159–161.

Tourtellot v. *Phelps*, 4 Gray, 370, 376.

Pratt v. *Lamson*, 2 Allen, 275.

Merrifield v. *Lombard*, 13 Allen, 16.

Drake v. *Hamilton Woolen Mill Co.*, 99 Mass. 574–581.

Commonwealth v. *Vincent*, 108 Mass. 441, 446, 447.

Merrifield v. *Worcester*, 110 Mass. 216.

Lund v. *New Bedford*, 121 Mass. 286, 290.

Dwight Printing Co. v. *Boston*, 122 Mass. 583.

Clapp v. *Herrick*, 129 Mass. 292.

Whitney v. *Wheeler Cotton Mills*, 151 Mass. 396–405.

Washburn & Moen Co. v. *Worcester*, 153 Mass. 494.

Maynard v. *Northampton*, 157 Mass. 218.
Fales v. *Easthampton*, 162 Mass. 422.
Sprague v. *Dorr*, 185 Mass. 10.

The property right established by these and other Massachusetts cases is stated by Mr. Justice KNOWLTON in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, at pages 560 and 561, as follows: —

> "The usufruct of water in a watercourse is inherent in the ownership of the land through which the water flows. It is often the principal element of value in the real estate of which it is a part. Lord WENSLEYDALE says, in *Chasemore* v. *Richards*, 7 H.L. Cas. 349, 382: 'It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner.' Chief Justice SHAW, in *Johnson* v. *Jordan*, 2 Met. 234, 239, uses these words: 'Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied. . . . It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel.' In *Gardner* v. *Newburgh*, 2 Johns, 162, 165, Chancellor KENT says: 'A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised but by lawful judgment of his peers, or by due

process of law. This is an ancient and fundamental maxim of common right to be found in Magna Charta.'

"The permanent deprivation of this right is a taking or destruction of property, and a diversion of water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property. As against riparian proprietors below, not even the State can authorize it without a provision for their compensation. This doctrine rests upon a principle of universal law, recognized from the earliest times, not only in this country and in England, but in continental Europe. It is established by such a weight of authority that it is no longer fairly open to question."

In that case, *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, the state, being the owner of the waters of a great pond which it held in trust for public uses, granted to the city of Fall River the right to take and use the waters for domestic purposes without making compensation to riparian proprietors on the outlet of the pond for a substantial diversion of the waters in pursuance of the grant. The proprietors brought a bill in equity to restrain such diversion. At the first trial of that case it appeared that the riparian proprietors held their lands under a grant from the state, province, or colony, which did not purport to convey the waters of the pond. The court, in a majority opinion, held that such grant did not pass any right to the pond or its waters, that the rules of the common law governing ordinary streams did not apply to that case, and ordered the bill to be dismissed. It did, however, at page 554, state the common law rule of riparian proprietorship

in substantial accordance with the language of Mr. Justice KNOWLTON, who delivered a dissenting opinion to the effect that the case was within the ordinary rules. In a subsequent trial of the same case it appeared that the state had parted with the title to the pond before the colonial ordinance was enacted, and the court held that the state could not, without compensation, authorize the diversion complained of, and granted the injunction.

Watuppa Reservoir Co. v. *Fall River*, 154 Mass. 305.

The following are some of the cases in which it is said that the right to fish in a non-navigable stream is the exclusive right of the riparian proprietor, from the enjoyment of which the public are excluded, and for an infringement of which the owner can maintain a common law action of trespass: —

Ingraham v. *Wilkinson*, 4 Pick. 268, 271.
Commonwealth v. *Chapin*, 5 Pick. 199.
Commonwealth v. *Alger*, 7 Cush. 53, 97.
McFarlin v. *The Essex Co.*, 10 Cush. 304, 309.
Russell v. *Russell*, 15 Gray, 159.

The nature of this private right of fishery and its subordination to the police powers is thus stated in *Commonwealth* v. *Chapin*, *ubi supra* (cited in *Swift* v. *Falmouth*, 167 Mass. 115, 120):

> "It does not appear by the facts reported, or by the verdict, whether at the place where the dam is built the river is navigable or not; we may take it for granted, however, that the place is above the flowing and ebbing of the tide, and that being the case, it is

not a navigable river there, within the meaning of the term navigable as understood by the common law. The doctrine of Lord HALE, as laid down in his treatise De Jure Maris, has been approved of and adopted as the law of England, of New York, Connecticut, and of this Commonwealth; and he divides rivers into two classes, navigable and not navigable. They are considered navigable where the tide ebbs and flows, and not navigable above that point. The former belong to the sovereign or public, the latter may be the subject of private property. In the former, the fishery is common to all the subjects, under such restraints as the government may impose; in the latter, it belongs to the owners of the soil adjoining to and under the river; for the owner of the land is owner to the thread of the river, *usque ad filum medium aquæ*. *Vide* Hargr. Law Tracts, 6, 7, 8; Davies's Rep. 152; *The People* v. *Platt*, 17 Johns, R. 209; *Adams* v. *Pease*, 2 Connect. R. 481; *Carter* v. *Murcot*, 4 Burr. 2162. . . .

"The right of passage and of transportation upon rivers not strictly navigable, belongs to the public, by the principles of the common law; but the right of fishery remains unrestricted, *so that each proprietor of the land adjoining has a several or exclusive right of fishery in the river, immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent.*

"And yet it appears that this common law right of several fishery in the owners of land bordering on rivers not navigable, is subject to a reasonable quali-

fication, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws, *Sic utere tuo ut alienum non lædas.* Upon the same principle, that the exclusive property in the banks and bed of a river is subject to the public easement on the waters, the right of several fishery is limited to the taking of fish, but does not carry with it the right to hinder the passing of them above, that other owners may be prevented from enjoying a similar privilege."

The following are some of the cases in which it is held that at common law a riparian owner has a private right that the waters of a non-navigable stream shall not be polluted by others so as to interfere with his reasonable use of the same for proper purposes, and that for an infringement of that right he has a remedy at law and equity: —

Merrifield v. *Lombard*, 13 Allen, 16.
Merrifield v. *Worcester*, 110 Mass. 216.
Dwight Printing Co. v. *Boston*, 122 Mass. 583.
Washburn & Moen Co. v. *Worcester*, 153 Mass. 494.
Sprague v. *Dorr*, 185 Mass. 10.

The leading case in Massachusetts, *Merrifield* v. *Lombard*, 13 Allen, 16, was a bill in equity setting forth that

the defendant had thrown into a stream corrosive substances which corroded the plaintiff's engines and boilers in a factory on the banks below. It appeared that the plaintiff's factory was built since the use commenced.

The court, in its opinion, said, —

"The case, as made by the bill, answer and agreed facts, establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural watercourse passes, that he should use the water in such manner as not to destroy, impair or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like man-

ner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes."

The following are some of the cases in which it is held that at common law a riparian proprietor has a right to have the waters of a stream flow to him without an unreasonable diversion and can maintain an action of tort for damages occasioned by a violation of such right or a bill in equity to restrain it: —

Newhall v. *Ireson*, 8 Cush. 595.
Lund v. *New Bedford*, 121 Mass. 286.
Dwight Printing Co. v. *Boston*, 122 Mass. 583, 589.
Wamesit Power Co. v. *Allen*, 120 Mass. 352.
Warren v. *Spencer Co.*, 143 Mass. 9.
Watuppa Reservoir Co. v. *Fall River*, 154 Mass. 305.
Hollingsworth & Vose Co. v. *Foxborough Water Supply Co.*, 165 Mass. 186.
Lexington Print Works v. *Canton*, 171 Mass. 414.

Lund v. *New Bedford*, *ubi supra*, was an action of tort for diverting the water of Acushnet river above the plaintiff's dam. The defendant justified its acts as having been done for the purpose of supplying the city with pure water under the St. of 1863, c. 163. The city had failed to file a statement of taking as required by statute.

In that case the court said, —

"In the action of Lund, the plaintiff can maintain his action, although, upon the evidence reported, he

can recover only nominal damages. He is the owner of the mill and privilege. He has agreed to convey the estate to the plaintiffs in the other action, and they are in occupation of it, but until the conveyance they occupy it as his tenants, and the reversion is in him. For any temporary trespass, which injures only the present enjoyment of the estate, he cannot recover. But for any injury to his reversion he is entitled to maintain an action.

"It is a settled rule, that where an act is done which violates the rights of any one, and which is of such a nature that, if it be continued for a sufficient period of time, the wrongdoer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor without proof of any other actual damages. *Hastings* v. *Livermore*, 7 Gray, 194. *Elliott* v. *Fitchburg Railroad*, 10 Cush. 191. *Newhall* v. *Ireson*, 8 Cush. 595. *Webb* v. *Portland Mfg. Co.*, 3 Sumner, 189. In this case, the defendant has constructed permanent conduits and other works for the purpose of supplying the city with water, and has withdrawn and is constantly withdrawing large quantities of water to the injury of the plaintiff's mill privilege, under a claim of right. If its acts are acquiesced in for a sufficient length of time, it might give the defendant a title by adverse possession. For this invasion of his right, the plaintiff Lund may maintain an action without proof of other actual damage."

The following are some of the cases in which it is held that a riparian proprietor has a private right to use the natural fall of the stream as it passes through his land for

hydraulic purposes, and that he may maintain an action of tort for damages, or a bill in equity to enjoin the continuance of the obstruction to the flow, or may enter upon the premises of the wrongdoer and abate the nuisance.

Williams v. *Nelson*, 23 Pick. 141, 142.
Hill v. *Sayles*, 12 Met. 142; (s.c.) 4 Cush. 549; (s.c.) 12 Cush. 454.
Tourtellot v. *Phelps*, 4 Gray, 370–376.
Pratt v. *Lamson*, 2 Allen, 275.
Smith v. *Agawam Canal*, 2 Allen, 355.
Brigham v. *Wheeler*, 12 Allen, 89, 90.
Drake v. *Hamilton Woolen Co.*, 99 Mass. 574, 581.
Clapp v. *Herrick*, 129 Mass. 292.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Ludlow Mfg. Co. v. *Indian Orchard Co.*, 177 Mass. 61.

The common law rule is thus stated in *Tourtellot* v. *Phelps*, 4 Gray, 370–376:

"*It may be proper to state the familiar rule of law in this commonwealth, which is that each proprietor of land through which a natural watercourse flows has a right, as owner of such land, and as inseparably connected with and incident to it, independently of the mill acts and of all grants and agreements with other proprietors above or below, to the natural flow of the stream through his land, and its descent, and all the force to be derived therefrom, for any hydraulic purpose to which he may think fit to apply it.* But, in order that each may enjoy this right, every one is bound to use it reasonably as it passes through

his own land, so as not to injure the equal right of all other proprietors. He shall not poison or corrupt the water; he shall not wholly divert, or hold it back unreasonable lengths of time, or let it down in unreasonable quantities. What is reasonable, under all circumstances, must depend much upon the character of the stream, its relative position, the usage of the country, and the state of the arts, not necessary to be stated for the present purpose. This is the natural and inherent right of each riparian proprietor, and passes with it as parcel of the estate. If either relinquishes any portion of his own right or acquires that of another, it must be by grant or prescription, that is by contract, actual or presumed."

Setting the waters back is actionable as a violation of a private right, even though unaccompanied by actual damages.

HOLMES, C.J., in *Ludlow Mfg. Co.* v. *Indian Orchard Co.*, 177 Mass. 61.

"It is very clear, that to raise a dam on one's own land by which the water is set back on another's without grant from the latter, would be a tort, for which case would lie. If such a dam is continued twenty years, without action, complaint, or protest, on the part of the land-owner, it is evidence of a right, and as such right may be and often is acquired by grant, it is taken to be presumptive evidence of a grant and may be so pleaded."

Williams v. *Nelson*, 23 Pick. 141, 142.
Brigham v. *Wheeler*, 12 Allen, 89.

The difference between the private property right of the

riparian proprietor to use the natural fall of the stream for power and his right as one of the public to use the stream for boating is clearly shown in *Blood* v. *Nashua & Lowell Railroad Corporation*, 2 Gray, 137, in which it was held, as stated in the head note, that —

> "A railroad corporation, building a bridge across a stream, are liable for the damage thereby occasioned to the owners of a saw-mill above, by the obstruction of the stream so as to prevent the water from passing off from his mill as freely as it had previously; but are not liable for the damage suffered by him by being impeded and put to increased expense in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts, or not."

In the opinion of the court, delivered by SHAW, C.J., it is said, at pages 139, 140, —

> "The question is, whether the awards of damages are founded on correct legal principles, and whether the report can be accepted. In considering it, we must take notice that there are two classes of rights which may be had in rivers, streams and watercourses in this commonwealth.
>
> "Every person owning land, through or along which a watercourse passes, has a right, as inseparably incident to his estate, to the beneficial use of the stream in its passage, in its natural channel, for all purposes for which it can be usefully applied, to supply his cattle, to irrigate his land, and the like; and if the fall be sufficient, he may use it as a mill power. It follows of course that no riparian proprietor higher up has a right to divert or corrupt it, or render it unfit for use; and no riparian proprietor below has a right to

obstruct its free passage off, or to set it back upon the mill or land of such owner.

"But there is another right, in rivers and watercourses, for navigation, boating and rafting. The rule of the common law is, that waters are not navigable, unless within reach of the ebb and flow of the tide. But it has often been held here, that the public have a right to the use of the large rivers, and indeed of all rivers and watercourses, suitable for boats and rafts, and in that sense they are deemed navigable, though above the ebb and flow of the tide. In these, there is a right of way for boats and rafts. *Commonwealth* v. *Charlestown*, 1 Pick. 180. *Commonwealth* v. *Chapin*, 5 Pick. 199.

. . . . . .

"Perhaps the case does not disclose facts enough to enable us to judge, whether that section of Stony Brook, lying between the plaintiff's mills and the Merrimack River, is or is not navigable for rafts and boats. But we have not thought that question material; for, if it is not navigable in this sense, then the plaintiffs had no right to use it for boats and rafts, the loss they sustain in getting logs through it is *damnum absque injuria*. But supposing it to be navigable for boats and rafts, (the supposition most favorable to the plaintiffs), they cannot maintain this action because such obstruction would be a public, not a private nuisance; it would be a violation of the public right, not of the plaintiffs' private right. The obstruction of a public right of way is a public, not a private wrong; it may affect those near the obstruction much more than the rest of the public; but the damage sustained by those near it differs in degree only, not

in kind. It is a wrong therefore, if it be one, to be redressed by a public prosecution, not by recovering damages in a private action."

See also *Blackwell* v. *Old Colony R. Co.*, 122 Mass. 1.

In *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 43, the court, overlooking the distinction between the common law rights of a riparian proprietor and his rights under the Mill Act, and mistaking the scope of two cases cited in its opinion, held that a riparian proprietor whose unimproved land, flowed under the Mill Act, had a value of $33.84 for agricultural purposes, and of $733.34 for mill purposes, was entitled to damages only for the smaller sum.

In its opinion the court say, with reference to the mill acts,—

"They only substituted, in the place of the common law remedies, a more simple, expeditious and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. It follows that, as a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he cannot maintain a complaint under the mill acts to recover similar damages."

It is apparent, however, that the Mill Act takes away the common law right of the land owner to abate a dam which

flowed his land as well as his right to have the flowing enjoined by a court in equity.

In support of this decision the opinion cited *Hatch* v. *Dwight*, 17 Mass. 289, and *Cary* v. *Daniels*, 8 Met. 466.

In *Hatch* v. *Dwight* the action was trespass for flowing the plaintiff's mill-site. The Mill Acts were then in force, and the court, in its opinion, said that a mill owner had a right to flow an upper unimproved mill-site. This statement, however, was of the rule under the Mill Act (not of the common law rule) as stated by the court in *Hill* v. *Sayles*, 12 Met. 142, at page 147; viz., —

> " 'No action shall be sustained at common law, for the recovery of damages, for the erecting, maintaining or using any mill or mill dam, except as is provided in this chapter.' (Rev. Sts. c. 116, sec. 30.) This clause is to be construed in connexion with all the other provisions of the chapter. It has been truly said that all the statutes on this subject, being *in pari materia*, must be taken together, and so construed, if practicable, as to make a harmonious system. The clause in question prohibits any action at common law, except as is provided in the same chapter; and it may be that in terms no action is therein given, in a case like this. But that which arises by necessary implication from the statute is as effectually excepted, as if it had been so in terms. *The clause in question was manifestly intended to give the sanction of a positive enactment to a principle long since adopted, in* Stowell *v.* Flagg, *11 Mass. 364, that when a mill dam was rightly erected and maintained, conformably to the statute, no action at common law would lie. This was necessary to give to mill owners the security*

and quiet which the statutes designed to afford. But in the same case, it is distinctly intimated, that if the terms of the statute are not complied with, as where the dam is kept up at a season of the year prohibited by the verdict and judgment, the mill owner shall have no benefit of the statute, *but be liable, as if it had not been passed, to a suit at common law, for the disturbance.*"

And again in *Fitch* v. *Stevens*, 4 Met. 426, 428, the court said, —

> "These laws have been continued with various modifications for more than a century, having the same end in view, namely, the protection of mill owners in the enjoyment of heads of water necessary to drive their mills, subject to the claim for damages for overflowing the neighboring lands. And it was decided in this court, in the case of *Stowell* v. *Flagg*, 11 Mass. 364, after a careful and able examination of these statutes, that no action, since the St. of 1795, c. 74, would lie at common law against a mill owner for flowing the land of another."

The statute of 1795, c. 74, was one of the early mill acts, and will be found on page 144 of this brief.

In *Cary* v. *Daniels*, the second case cited in the opinion in *Fuller* v. *Chicopee*, *ubi supra*, SHAW, C.J., after stating the common law right of a riparian proprietor, and declaring that a lower proprietor cannot obstruct the stream so as to throw it back upon the mills or lands of the proprietor above, continued, —

> "We, of course, now speak of rights at common law

independent of any modification thereof by statute. And one of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills, and machinery, a use profitable to the owner and beneficial to the public. It is therefore held," etc.

He then proceeded to state the rule of priority of occupation by flowage under the Mill Act, without referring to the act in terms.

In *Gould* v. *Boston Duck Co.*, 13 Gray, 442, Chief Justice SHAW, in stating the modification of the common law rule by the Mill Acts, clearly distinguished between the common law rule and the statutory privilege, in the following language: —

"This rule is, that every proprietor of land through which a watercourse runs has a right to the use of the impelling course of the current, or what is more familiarly called the head and fall of the current, for mill purposes, so far as they exist on his own land, if there be any such head and fall within his own limits. If the water flows at nearly a level, there will be no such available head and fall. If the descent be very rapid, there will be such head and fall, and of course mill sites or privileges, at short distances from each other. If the descent be gentle and regular, and the land of a proprietor not extensive, the head and fall on his own land may be quite insufficient for practical use, for mill purposes. This latter consideration probably led to an early modification of the common law in Massachusetts, by a provision that such a proprietor might erect a dam on his own land and raise a

head of water to his own best advantage, although it might raise the water in the bed of the river beyond and above the limits of his own land; notwithstanding it might flow back, by such rise in the bed of the river, upon the land of other proprietors — *with a provision for a compensation in damages.*

"These provisions have effected a change in the common law to this extent: By the common law, the rights of each successive riparian proprietor to the reasonable use of the mill power of the stream are equal; each has a right to a reasonable use of it as it passes through his own land only, with a right incident thereto to erect such dams, canals, sluices, and water ways, as to fit it for the actual working of mills. By the right given by the mill acts to any proprietor to flow back beyond his own limits, the common law is changed to some extent. Before any mills are erected, the right of each proprietor is the same; it is a right to appropriate the power of the stream, by the actual erection of a mill, though the head and fall within the limits of his own land are insufficient, and in order to get sufficient head he raises his dam so as to flow beyond his own limits. The necessary consequence is, that when one proprietor, under the common right, has in fact appropriated the power, the proprietor below is so far restricted in his right of appropriation, that he cannot erect a mill on his own land, and flow back the water, to the destruction of the mill already erected by authority of law. This priority of first possession necessarily arises from the nature of appropriation; where two or more men have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others,

the first in time is the first in right. *Cary* v. *Daniels*, 8 Met. 466."

The distinction is also clearly drawn in *Smith* v. *The Agawam Canal Co.*, 2 Allen, 355, 356, in which it is said that at common law a riparian proprietor —

"cannot lawfully divert or diminish the quantity of water which would otherwise descend to the proprietors of lands below, or throw it back upon the lands of those above. . . .

"But under our statutes, any person may erect and maintain a water-mill, and a dam to raise water for working it, across any stream which is not navigable; and for this purpose may lawfully flood the lands of all persons over which the water will be caused to flow by keeping up and maintaining the dam. This privilege, however, is given subject to the prescribed conditions and restrictions; one of which, among many others, is, that no such dam shall be erected to the injury of any mill lawfully existing either above or below it on the same stream. Gen. Sts. c. 149, sections 1, 2, *et seq.* Rev. Sts. c. 116; St. 1795, c. 74.

"From these provisions it is an inevitable implication, that, although the right is given indiscriminately to all riparian proprietors, he who first erects and establishes his mill does, by his priority of occupation, acquire to that extent a title to the use of the water in the stream prior and superior to that of any other person, and a right to maintain his dam against all proprietors of lands both above and below his own. *Cary* v. *Daniels*, 8 Met. 466."

Fuller v. *Chicopee*, *ubi supra*, however, concedes the right of a riparian owner to recover all damages caused by flowage excepting the diminution in value of his land caused by the destruction of or injury to an undeveloped fall thereon.

While *Fuller* v. *Chicopee* denies to the owner of an unoccupied mill-site (vacant land) compensation for such diminution in value, the statement therein contained, that such owner could not maintain an action at common law for all damages occasioned by flowage, is opposed to the authority of every other case in Massachusetts on the subject, and that case has never been cited by the courts of that state until Mr. Chief Justice KNOWLTON, in the opinion in the case at bar, included it in a general citation of cases which were inconsistent with it.

It is interesting in this connection to again quote the language of Mr. Justice KNOWLTON in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548–560, with reference to the right to use the natural fall of a stream:

> "The usufruct of water in a watercourse is inherent in the ownership of the land through which it flows. It is often the principal element of value in the land of which it is a part. . . .
>
> "The permanent deprivation of this right is a taking or destruction of property, and a diversion of water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property. As against riparian proprietors below, not even the State can authorize it without a provision for their compensation. This doctrine rests upon a principle of universal law, recognized from the earliest times, not only in this country

and in England, but in continental Europe. It is established by such a weight of authority that it is no longer fairly open to question."

The common law rights of a riparian owner to use his land and the stream flowing through it without the interference of back water are distinctly conceded by the state court in the case at bar.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89–95. (Record, p. 116.)

A riparian owner whose land has an inherent market value by reason of its adaptability for creating a water power by flowing the land of another under the Mill Act is entitled to recover damages on account of the loss in market value in that respect caused by the taking of the waters of a stream flowing through his land.

Fales v. *Easthampton*, 162 Mass. 422, 425.

The authorities cited both before and after the decision in *Fuller* v. *Chicopee* clearly establish the common law right in Massachusetts of a riparian proprietor to use the natural fall of the stream through his land for hydraulic purposes, as well as his common law right to abate an obstruction flowing his land and interfering with such use, to recover damages caused by such obstruction, and to have the continuance of the same enjoined by a court in equity.

It is interesting to note in this connection the decisions of other courts:

"The water power to which a riparian proprietor is entitled consists of the fall in the stream when in its natural state, as it passes through his land, or

along the boundary of it, or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an accident, and it may in the same way be occupied in whole, or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, . . . and as to a right by prior appropriation, that has regard to the quantum of water withdrawn from a stream common to both parties, and not to the quantum of fall."

M'Calmont v. *Whitaker*, 3 Rawle, 84, at page 90.

"The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor, is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself, without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water."

Lancey v. *Clifford*, 54 Me. 487, 490.

"The owner of land has rights to the use of a private stream running over his land, peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation by another, but only by grant or by the use or occupancy of another for such

a length of time as that therefrom a grant may be presumed."

Davis v. *Fullers*, 12 Vt. 178, 190.
Parker v. *Hotchkiss*, 25 Conn. 321.
Keeney v. *Wood Mfg. Co.*, 39 Conn. 576.
Heath v. *Williams*, 25 Me. 209.

In *Spring* v. *Lowell*, 1 Mass. 423, 430, SEDGWICK, J., said, —

"It may be observed that the sacred rights of private property are never to be invaded but for obvious and important purposes of public utility. Such are the things necessary to the upholding of mills. Hence the legislature have authorized mill owners to invade the property of their neighbors, even real property, which by our laws seems to be regarded as the most inviolable, so as to render it wholly useless by overflowing it with water whenever the same shall be *necessary* to the beneficial occupation of the mills. This invasion of private property is authorized only by statute, and in no case but from *necessity* for the attainment of the objects intended."

II.

The right of the plaintiff to use its land for general purposes, and its right as a riparian proprietor to make use of the stream for hydraulic purposes, are property rights within the meaning of the due process of law clause of the 14th Amendment.

Of course the constitutional rights of the plaintiff with respect to lot No. 6 bordering on the stream, conveyed to

it by Metcalf, are not less than its constitutional rights with respect to lot No. 10 conveyed to it by Powell which does not extend to the stream.

The plaintiff, under the decisions of the state court, had the private right at common law, to the exclusion of all others, whenever it saw fit to do so, to use its land, and also to make use on its land of the natural fall of the stream within the limits thereof (12.88 feet of which has been taken by the defendant) for hydraulic purposes, and the enjoyment of this and other rights was secured to it under the decisions of the state court, by remedies at law and in equity, and by the further right to enter on land of another and remove any obstruction in the stream which flowed the water back upon its land.

While a riparian owner is not entitled to compensation for damages or annoyance caused by the exercise of the sovereign or police powers of a state in a manner which does not violate the owner's private rights, —

Barney v. *Keokuk*, 94 U.S. 324;
Northern Trans. Co. v. *Chicago*, 99 U.S. 635;
Eldridge v. *Trezevant*, 160 U.S. 452;
Gibson v. *United States*, 166 U.S. 269;
St. Anthony Falls Water Power Co. v. *St. Paul*, 168 U.S. 349;
Scranton v. *Wheeler*, 179 U.S. 141;
Bedford v. *United States*, 192 U.S. 217,

yet such owner cannot, even under such sovereign or police powers, be deprived of his rights without compensation.

Yates v. *Milwaukee*, 10 Wall. 497.

Pumpelly v. *G.B. & M. Canal Co.*, 13 Wall. 166.

~~*Head v. Amoskeag Mfg. Co.*, 113 U.S. 9.~~
~~*Kaukauna W.P. Co. v. G.B. & M. Canal Co.*, 142 U.S. 254.~~

United States v. *Lynah*, 188 U.S. 445.

These are the same rules this court applies to land.

Mo. Pac. R. v. *Nebraska*, 164 U.S. 403.
Meyer v. *Richmond*, 172 U.S. 82.

The fact that the plaintiff had not improved the lower portion of its mill privilege at the time when the defendant dug a hole on land two miles below, does not withdraw the plaintiff's property from the protection of the 14th Amendment.

The capacity of unimproved or unoccupied property for improvement for agricultural, commercial, or hydraulic purposes is property under both the Federal and state law.

We refer to the language of the courts in cases cited.

"So far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation."

Kaukauna Water Power Co. v. *G.B. & M. Canal Co.*, 142 U.S. 254, 276.

"Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated,

there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated." . . .

Boom Co. v. *Patterson*, 98 U.S. 403, 407.

"It is not the present use, but the possibilities of use which determine the value of property. Can the owner of vacant land have it taken from him without compensation simply because at the moment he does not use it?"

Chicago &c. R.R. Co. v. *Chicago*, 166 U. S. 226, 260.

"The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incident

to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is, fundamentally, the right of user, including of course the corresponding right of excluding others from the use."

Eaton v. *B.C. & M. R.R.*, 51 N.H. 504, 512.

Property is the right of any person to possess, use, enjoy, and dispose of a thing.

Wynehamer v. *The People*, 13 N.Y. 378, 396.

"What then is the nature of the damage which an owner of land may sustain from the erection and maintenance of such a dam? It is a work authorized by law, and by a law which recognizes the right of the legislature to take private property for public use, on paying an adequate compensation therefor, and provides for its exercise; so that it is not unlawful, its erection is not a nuisance, and its maintenance is not the continuance of a nuisance. It is permanent and perpetual in its nature. It is done for the purpose of raising and maintaining water to a certain height, and the damage, which that may do to adjacent land, will be permanent. It not only deprives the owner of the products and profits of the land, but by permanently changing its condition, it deprives it of the capacity for future cultivation and improvement. It therefore deprives the land, in whole or in part, of its actual, present exchangeable value; and such loss or diminution of value is the measure of the owner's damage. *It may be that the land has never yielded any profit; it may be swamp or morass; but*

if capable of being drained, subdued and cultivated, it is of value; and depriving it of that capacity for improvement is a loss to the owner. And these considerations are all to be taken, by those who are called on to assess such damages."

Heard v. *Middlesex Canal*, 5 Met. 81, 85.

"The depriving one of the beneficial use of his lands is, in the sense of the law, a taking of his lands. It would be very clear in the case of flowing."

Mill Corp. v. *Newman*, 12 Pick. 467, 482.

"In estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken. In like manner, the effect on that which is left should be estimated in reference to all the uses to which it was naturally adapted before the taking. Damages are not to be awarded in reference to the peculiar situation or circumstances or plans of the owner, or to the business in which he happens to be engaged; but any and all of the uses to which the land considered as property may profitably be applied, whether contemplated by the owner or not, may well be taken into account by the jury."

Maynard v. *Northampton*, 157 Mass. 218, 219.

In *Fales* v. *Easthampton*, 162 Mass. 422, the court held that in determining the damages suffered by an owner of a mill-site it was competent for the jury to consider not only its value in connection with water power existing at the time of the taking, but also in connection

with the water power which might be acquired by flowing the lands of upper riparian proprietors under the Mill Act.

The fact that a water power has never been utilized does not deprive the riparian owner from recovering compensation for damages to the same when the water is taken for municipal purposes.

Baxter v. *Rutland*, 67 Vt. 607, 608.

In the present case the plaintiff's water power existed on the plaintiff's land, and the development thereof by the plaintiff flows only the plaintiff's land.

The cases cited fully establish the plaintiff's property rights to the land which was flowed, and to the use of the natural fall of that land in connection with the water of the stream.

III.

Whether an interference with property rights is a taking of property within the due process of law clause of the 14th Amendment, is a Federal and not a local question.

~~*Hollingsworth* v. *Texas*, 17 Fed. Rep. 109.~~
~~*Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166.~~
~~*Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9.~~
Chicago, B. & Q. R.R. v. *Chicago*, 166 U.S. 226, 241
Mo. Pac. Ry. Co. v. Nebraska 164 U.S. 403
Smyth v. Ames 169 U.S. 466.

Flowing the land of another under the authority of a Mill Act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the benefi-

cial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause of the 14th Amendment, entitling the owner to compensation.

Flowing the land of another is such a taking.

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 166.
Head v. *Amoskeag Co.*, 113 U.S. 9, 26
United States v. *Lynah*, 188 U.S. 445.
Mill Corp. v. *Newman*, 12 Pick. 467, 478, 482.
Sinnickson v. *Johnson*, 17 N.J. L. 129.
Eaton v. *B.C. & M. R.R.*, 51 N.H. 504.
Arimond v. *Canal Co.*, 31 Wis. 316.
Lee v. *Pembroke Iron Co.*, 57 Me. 481, 488.
Ingram v. *Water Co.*, 98 Me. 566, 572.

The case of *Manigault* v. *Springs*, decided by this court December 4, 1905, recognizes the rule of *United States* v. *Lynah*, and *Pumpelly* v. *Green Bay & M. Canal Co.*, *ubi supra*, to the effect that flowing is a taking which demands compensation when subsatntial damages result.

It is difficult to see how the 14th Amendment can require compensation to be made to a riparian proprietor for a loss or damage of fifty thousand dollars caused by flowing his land and deny compensation to another riparian proprietor for a trifling loss of fifty dollars caused in the same manner and by the same act, or how the adoption of such a rule can fail to lead to a discrimination in favor of the owners of large possessions. But whether the test of constitutional rights to compensation depends upon the amount of loss or the violation of private rights, is immaterial in the case at bar because, to use the language of the state

court in this case, "the defendant's dam sets back water upon the plaintiff's dam in such a way as very greatly to diminish the water power there." (Opinion of the Supreme Judicial Court, Record, p. 112.)

An owner is deprived of his property when he is deprived of the right to use and enjoy it.

Edwards v. Preston 184 Mass. 529.

~~Aetna Mills v. Waltham, 126 Mass. 422.~~

Howe v. *Weymouth*, 148 Mass. 605.

~~*Mills v. Randolph*, 157 Mass. 345.~~

In re Wall St., 17 Barb. 617.

Portland v. *Lee Sam*, 7 Oregon, 397.

Driver v. *Western Union R.R. Co.*, 32 Wis. 569.

Forster v. *Scott*, 136 N.Y. 577.

Whyte v. *Kansas*, 22 Mo. App. 409.

Isele v. *Schwamb*, 131 Mass. 337.

~~*Edwards v. Preston*, 184 Mass. 529.~~

A right taken is to be paid for without regard to time when or the extent to which the taker may see fit to exercise it.

Newton v. *Perry*, 163 Mass. 319.

Imbescheid v. *Old Colony R.R. Co.*, 171 Mass. 209.

The Massachusetts rule that "the right to erect and maintain a dam to raise water for working a mill does not give to the mill owner any right in the land flowed or take away any right from the land owner," because "the latter may embank his land and thus stop any flowage of it, or if he chooses he may collect of the mill owner damages in gross or annually for the flowage" (*Turner* v. *Nye*, 154 Mass. 579, 583; *Lowell* v. *Boston*, 111 Mass. 454, 466;

Williams v. *Nelson*, 23 Pick. 141, 143), is opposed to the decisions of this court, violates the 14th Amendment, and is generally condemned.

Lewis, Eminent Domain, secs. 182, 183.

It overlooks the fact that the embankment by the land owner to prevent the flooding by the mill owner produces, at the former's expense, the identical results to be avoided; and eminent judges of the Supreme Court of Massachusetts have refused to assent to it.

Kenison v. *Arlington*, 144 Mass. 456, 457.
Turner v. *Nye*, 154 Mass. 579, 585, 586.
Isele v. *Bank*, 135 Mass. 142, 144.

V.

The Mill Act (Mass. Pub. Sts. c. 190), printed on page 153 of this brief, authorizes depriving a person of property without due process of law within the meaning of the 14th Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as to utterly fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected.

The Mill Act, Pub. Sts. c. 190, secs. 1, 2, is as follows: —

"Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon

the terms and conditions and subject to the regulations hereinafter expressed.

"Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The decision of the state court in the case at bar bears out the interpretation of the Mill Act above stated in proposition V.

The master found and ruled (Master's Report, Record, p. 80) in accordance with the defendant's first request, —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege." (Master's Report, Record, p. 76.)

This appropriation comprehended the natural fall of 12.88 feet on the plaintiff's land (Master's Report, Record, p. 35), and the right to use the surface of the plaintiff's land for storing water, and excluded the plaintiff from the use of the slope of his land, and from the use of the land flowed, and deprived him of the beneficial enjoyment of his property.

The taking of the right to use the plaintiff's land and a natural fall of the stream thereon was accomplished by the defendant making the following occupation of its own land, viz., On the 3d day of August, 1899, the defendant dug a hole on its land two miles below the plaintiff's as a part of the tail race of an intended dam. (Master's Report, Record, pp. 38, 75.)

This occupation on the 4th day of April, 1900, the day when the plaintiff determined on building its dam (Master's Report, Record, p. 40), had progressed only to the extent of an excavation 8 to 10 feet deep, 25 to 30 feet long, and 12 to 15 feet wide, and the stripping of some of the soil, which was not commenced until March 30, 1900. This occupation did not indicate the height of the dam nor the height to which it was intended to flow (Master's Report, Record, p. 64), and was accompanied by an inquiry of the plaintiff by the defendant as to the location of the plaintiff's boundary line, as if the defendant intended to observe it (Master's Report, Record, p. 61), and by the intentional concealment by the defendant from the plaintiff of its intention to flow the plaintiff's property. (Master's Report, Record, pp. 63, 64.)

As late as August 5, 1900, there was no construction of the defendant's dam above the surface of the soil, and not until September 8, 1900, did the defendant begin the laying of the stonework. (Master's Report, Record, p. 66.)

It was not until April 11, 1901, that the plaintiff, by means of a direct inquiry, learned the defendant's dam, when completed, would flow the plaintiff. (Master's Report, Record, p. 63.)

The state court, in its opinion in the case at bar, says, —

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time." (Opinion of the Supreme Judicial Court, Record, pp. 112, 114.)

It follows, therefore, that a riparian proprietor, by an act of occupation of his mill-site in a manner which does not indicate to the owners of land above, whether riparian or otherwise, how far back he will flow, or even that he will flow at all, thereby deprives the owners of land for miles above of their right to the beneficial use and enjoyment of their own property.

It is incredible that such an act, accompanied, as in the present case, by concealment (Master's Report, Record, pp. 62, 63), bad faith, and false entries in books (Master's Report, Record, pp. 47, 60) is due process of law.

It is fundamental law that until private property has been taken the owner is entitled to the use and enjoyment thereof, and that the act of taking is invalid if not clear and intelligible. An act which does not indicate that a right is taken is not a taking.

The taking may be actual, as where the dominion exercised over the property, or the use made of it, shows that the owner is excluded from the enjoyment thereof.

A flowing of land by authority of statute is such a taking.

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 166.
Head v. *Amoskeag Co.*, 113 U.S. 9.
United States v. *Lynah*, 188 U.S. 445.
Roxbury Mill Corp. v. *Newman*, 12 Pick. 467, 478, 482.
Eaton v. *B.C. & M. R.R.*, 51 N.H. 504.
Manigault v. *Springs* (decided by this court December 4, 1905).

Flowing under this Mill Act (until the decision in the case at bar) was the act of appropriation in accordance with the rule laid down in *Storm* v. *Manchaug*, 13 Allen, 10, 15, in these words:

> "There is nothing in the statute now in force which vests any rights of flowing in the mill owner before he has actually exercised them; or which gives the land owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority in derogation of common law rights is not to be extended by construction."

The occupation of the surface of land by a mill pond is as clear and intelligible as a plan or written description.

In the *National Fibre Board Co.* v. *Lewiston & Auburn Electric Co.*, 95 Me. 318, 322, the court say, —

> "In other words a mill owner can at any time appropriate for raising and maintaining a head of water for working his mill, so much space in the river valley as has not already been appropriated by

> some other mill owner for his own mill. *This appropriation, however, must be actual to become a right.* It cannot be by mere proclamation nor even by marking limits. There must be an actual occupation of the space by a head or pond of water raised by dams actually constructed of the requisite height and efficiency to raise such a head."

It cannot be seriously claimed that digging a hole by an owner on its land is an actual appropriation of land of another two miles distant, or that the acts of the defendant on its land in August, 1899, which were not sufficient to raise the waters of the stream before October 16, 1901, were an actual prior appropriation of the fall of the stream on the plaintiff's land, which fall had been actually applied by the plaintiff to the working of its mills on the 1st day of July, 1901.

If this use by the defendant of its mill-site was a taking of the plaintiff's rights, it was so constructively by operation of law, just as a filing of a certificate of taking may operate as a taking under the authority of a statute.

The rule governing such takings is thus stated by the Supreme Judicial Court of Massachusetts in a case in which a taking by certificate was held void:

> "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority which interferes with his rights should be . . . clear and intelligible."
>
> *Glover* v. *Boston*, 14 Gray, 282, 288.

This rule applies to takings by written declarations which for convenience may be termed constructive takings.

Glover v. *Boston*, 14 Gray, 282.
Wilson v. *Lynn*, 119 Mass. 174.
Wamesit Power Co. v. *Allen*, 120 Mass. 352.
Kenison v. *Arlington*, 144 Mass. 456.
Woodbury v. *Marblehead Water Co.*, 145 Mass. 509.
Hollingsworth &c. Co. v. *Foxborough*, 165 Mass. 186.

In *Hamor* v. *Bar Harbor Water Co.*, 78 Me. 127, 130, it was held that riparian rights could not be constitutionally taken by an ambiguous act of diversion, and that a taking in such a case must be defined by writing. We refer to the language of the court for the statement of the case:

"The defendant corporation, by special act of the legislature approved February 10, 1874, c. 449, was authorized to take, detain and use the water of Eagle Lake, and Duck Brook, or either of them, for the purpose of conveying to, and supplying the village and vicinity of Bar Harbor with pure water; and to erect and maintain dams and reservoirs, and lay and maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water, and forming proper reservoirs thereof. By this act the corporation is held liable to pay all damages that may be sustained by any persons by the taking of any land, or other property, or by flowage, or by excavating through any land for the purpose of laying down pipes and aqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts.

"It is also provided that in case damage is sustained and the amount to be paid cannot be mutually agreed upon, then the party suffering such damage may cause the same to be ascertained in the same manner and under the same conditions, restrictions and limitations as are provided in the case of damages by the laying out of highways.

"By section 6, 'said corporation shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk of said Eden, and notice of such location shall be given to all persons affected thereby by the publication in some public newspaper in said county; and no entry shall be made upon any lands, except to make surveys, until the expiration of ten days from the said filing and publication.'

"The plaintiffs were the occupants of a saw mill upon Duck Brook, and this action on the case is brought by them to recover damages for the diversion of the water from said stream from March first, 1876, to March first, 1882.

. . . . . .

"It is thus that the right of property of private individuals, whether it be lands, or the usufructuary interest in flowing water, is made to subserve the public exigencies, and for which, under the constitution, 'just compensation' is guaranteed, and must be made. 'It is true the injury in the one case is to the land, and in the other to the water; but this can make no difference in the result. Interests in water, as well as in land, may be taken under this act; and both are equally the subjects of compensation.' *Denslow* v.

New Haven & Northampton Co., 16 Conn. 103; *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182; (s.c.) 45 Am. Rep. 659.

"Neither can water be diverted from a private stream under authority granted by the legislature in the exercise of the right of eminent domain for the purpose of supplying a town or village with pure water without making compensation to the riparian proprietors whose rights are thereby injuriously affected. *Bailey* v. *Woburn*, 126 Mass. 416: *Lund* v. *New Bedford*, 121 Mass. 286; *Wamesit Power Co.* v. *Allen*, 120 Mass. 354. Nor can individual property be taken, or individual rights impaired, for the benefit of the public without such compensation. *Canal Commissioners* v. *People*, 5 Wend. 456.

. . . . . .

"The statute authorized the taking, detaining and using of water in which the plaintiffs had valuable rights. That the defendants have taken the water is admitted. Yet it nowhere appears that the taking has ever been evidenced by any writing of any kind whereby the measure of such taking has been, or can ever be, made known to the plaintiffs or anyone else. There has been a taking of the plaintiffs' property, resulting in damages to them, but there has been no preliminary act evidenced by any writing specifying and defining what or how much has been taken, or is to be taken, which is necessary for the just protection and proper security of the owner of property taken.

. . . . . .

"There is no reason why the same requirements should not apply equally to the taking of water from a stream in which the plaintiffs have valuable riparian

rights, as to the taking of land. Both are equally the subjects of property and of compensation. *Ex parte Jennings*, 6 Cow. 526. By the statutes of this state the word land includes all tenements and hereditaments connected therein and all interests therein. The riparian proprietor may insist that his right to the use of water flowing in a natural stream shall be regarded and protected as property, *Nuttall* v. *Bracewell*, L.R. 2 Exch. 9. Such right is not a mere easement or appurtenance but is inseparably annexed to the soil itself. *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 299; *Cary* v. *Daniels*, 8 Met. 480. And the damage for the taking of such right may be greater or less according to the quantity of water diverted as the damage may be greater or less when measured by the quantity of land taken. If it be necessary, therefore, that the taking of land thus appropriated to public use be evidenced by some writing defining it by definite and specific boundaries, for the same reason should there be like evidence of the measure or quantity of water thus taken. Without this, no proper estimate of damages could be made. *Without this, no proper protection would be afforded to the parties without resorting to the 'uncertainties of conflicting testimony.'*

. . . . . .

"Not only, therefore, is the evidence, so far as the plaintiffs' rights are concerned, too uncertain, but the use of the grant too fluctuating, to afford a legal justification to the defendants; and the conclusion of the court is that this action may be maintained."

Warren v. *Spencer Water Co.*, 143 Mass. 9, is to the

same effect as *Hamor* v. *Bar Harbor Water Co.*, 78 Me. 127, and is so interpreted in *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365.

In *Gloucester Water Supply Co.* v. *Gloucester*, *ubi supra*, the state court, at page 374, say, —

> "Whether the actual diversion of water is a legal taking of, it is a question in which the cases in this Commonwealth are not in entire harmony," —

and in their opinion refer to *Warren* v. *Spencer Co.*, *ubi supra*, and *Hamor* v. *Bar Harbor Water Co.*, *ubi supra*, as decisions against its legality, and to *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, as supporting it.

The other cases referred to in the opinion in *Gloucester Water Supply Co.* v. *Gloucester*, *ubi supra* (of which *Moore* v. *Boston*, 8 Cush. 274, is a type), are cases in which the diversion of water was held to fix the date limiting the time in which petitions for compensation must be brought, but in which the takings were evidenced by definite descriptions of the property taken filed under the statutes.

Brickett v. *Haverhill Aqueduct Company* was a case of a definite actual appropriation. By reference to the record in that case it will appear that Kenoza lake was a great pond, the waters of which belonged to the state. The lake bordered on a highway and flowed out, through a culvert under the highway as a stream called Fishing river, through the plaintiff's land on the other side of the highway. Fishing river was three feet wide. The statute authorized the company to take the waters of the lake between high- and low-water mark. The company built a dam between the highway and the pond 4 to 5 feet long

and 28 inches high, being 20½ inches above high-water mark.

It was not claimed in *Brickett* v. *The Haverhill Aqueduct Co.* that the taking was ambiguous. The question argued and decided was whether the statute made adequate provisions for damages. The court held that the action, which was tort for diversion of a watercourse, could be maintained only for damages caused by land or water when the plaintiff would have had it if the dam had not been above high-water mark. The case finally resulted in a judgment of one dollar for the plaintiff.

Indefinite or ambiguous acts or conduct cannot constitute a taking, either actual or constructive, because from the very nature of things, if the subject matter is not physically appropriated there is no actual taking, and if the subject matter is not described or pointed out there is no constructive taking.

These considerations are of vital importance, because the owner's right to compensation is fixed and measured the very instant he is deprived of his right to use his property. Until his right to use his property is taken he has the right to improve it, and he has the right to recover the value of improvements existing when the taking occurs; but he cannot recover for improvements made subsequent to the taking.

If an indefinite, ambiguous act be held a valid taking, it would follow that a riparian owner, by the mere act of sinking a spade into the soil, takes a right to flow lands of owners miles above his property without their knowledge that their rights have been at all affected; and if the owners erect improvements on the land after the taking, they cannot recover the value of the improvements.

In order to meet the objection that an act of occupation like the excavation in the present case is too ambiguous to constitute a valid taking of land and property rights two miles distant, the defendant may claim that the taking of the property rights of the landowner is not complete until the latter's land is actually flowed, and may refer, in support of its contention, to the language of the state court in the case at bar; viz.,—

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time." (Opinion of the Supreme Judicial Court, Record, p. 114.)

This claim cannot be supported.

Before August 3, 1899, the day the defendant began its occupation of the Red Bridge mill-site, the plaintiff and defendant were on an equal footing as to their rights to use and develop their respective land and water powers. At common law each had a right to improve and use its land and the water power within the limits thereof. Under the decision of the state court in the case at bar, immediately upon and in consequence of its act of occupation of its land, the defendant acquired under the Mill Act a right to use the plaintiff's land and water power, defeasible only by the abandonment of, or by unreasonable delay in the completion of, the work begun; and whether the defendant pursued to completion the work so begun was a matter subject to its own will, and one in which the plaintiff had no voice. Whatever rights, absolute or conditional, the defendant acquired by such act of appropriation to deal thereafter with the plaintiff's land and water power, the

plaintiff from that moment was restricted in its right to the use and enjoyment of its land and water power.

It is true that the defendant would have lost the right to use the land if it had failed to proceed diligently with the development, but it had the right to so proceed if it saw fit, and no act of the plaintiff, after the commencement of occupation by the defendant, could have restored the plaintiff's rights. The test of taking is whether the land owner has been deprived of a right which he cannot regain, and not whether the mill owner may, at his own volition, lose a right which he has acquired.

It therefore follows in the case at bar that if the plaintiff's rights were taken by the flowing, and not before, the plaintiff is entitled under the Mill Act to recover the value of land and improvements in its then condition. If such be the interpretation of the Mill Act it authorizes, as in the case at bar, one mill owner to take and use for working its mill the land and water power of another mill owner devoted by the latter to operating a similar mill for substantially similar purposes.

The public in such case is not even indirectly benefited and the nature of the use of the power is changed in no legal respect.

The court can deal with this particular phase of the constitutional question unembarrassed by any apprehension that injurious results will follow from reversing the decision of the state court.

The decision by the state court that the digging a hole on a mill-site by its owner is a taking of land and water rights of another two miles above is an innovation, and is opposed to an uninterrupted line of cases in that state and in other states having somewhat similar statutes, holding

that no rights to flow vest in the mill owner before his property is actually flowed.

The clause in section 2 of the Mill Act, under which the state court in the case at bar held that digging a hole on the defendant's mill-site was a taking of the land and water rights of the plaintiff two miles above, is as follows: —

> "Nor shall a mill dam be hereafter erected or raised to the injury of any such mill site which has been occupied by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied." (Opinion of the Supreme Judical Court, Record, pp. 113, 114.)

We briefly refer to the Mill Act and the origin of the clause in question:

Pub. Sts. c. 190, sec. 1, authorizes a riparian proprietor to do that which it was unlawful for him to do at common law, namely, to erect a dam for mill purposes which will flow the land of another, and is as follows: —

> "Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed."

Pub. Sts. c. 190, sec. 2, provides that such a dam shall not be erected in certain cases, and is as follows: —

> "Section 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or

below it, on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise: nor shall a mill-dam be hereafter erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The origin of the clause in question is of importance.

The Provincial Laws, 1713–1714, c. 9 (Anne, 12, 13), so far as material to this point, were as follows: —

"Whereas it hath been found by experience, that when some persons in this province have been at great cost and expenses for building of mills serviceable for public good and benefit of the town, or considerable neighborhood, in or near to which they have been erected; that in raising a suitable head of water for that service, it hath sometimes so happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies, and law suits have arisen;

"For prevention whereof for the future:

"Be it therefore enacted by his Excellency, the

Governor, Council and Representatives in General Court assembled, and by authority of the same, That where any person or persons have already, or shall hereafter, set up any water mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills is or shall be erected or built; that then such owner or owners shall have free liberty to continue and improve such pond for their best advantage without molestation.

"And if any person or persons find themselves aggrieved and damnified in their propriety of lands by its being flowed by the owner or occupant of such mills stopping or raising the water; that in every such case, the party so damnified in his propriety, upon application for relief to the Court of General Sessions of the Peace in the county where such mills or pond is, the said Court be and hereby are empowered to issue out a warrant, directed to the sheriff of the same county, to summon and empanel a jury of good and lawful men, at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of the peace, to a faithful, indifferent appraisal of the yearly damage done to the person complainant, by flowing his or their land as aforesaid." . . .

Statute of Massachusetts, acts 1795, c. 74, was a substantial re-enactment of the same act, and, so far as material, was as follows: —

"Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts

and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors: Therefore,

"Sect. 1. *Be it enacted by the Senate and House of Representatives, in General Court assembled, and by authority of the same*, That where any person hath already erected or shall erect any water-mill on his own land or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water, and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner, and on the terms hereinafter mentioned.

"Sect. 2. *And be it further enacted*, That if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said court shall issue a warrant to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the same county not interested, such sheriff or coroner to be named by the court, directing him to summon and empanel a jury of twelve good and lawful men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the cause; and their verdict being returned by the officer to the same court, and there allowed and recorded, shall be a

sufficient bar to any action to be brought for any such damages. And it shall be in the power of said Court to assess such sum to the officer, for his services, as they may judge reasonable."

This act in terms authorized flowing the land of another and compensation to the owner for damages done "by so flowing his lands."

The court, however, applying the principle that cases within the letter, but not within the spirit, of the statute are not governed by it, held that the statute did not authorize flowing existing mills, or mills in process of construction.

Hatch v. *Dwight*, 17 Mass. 289.
Bigelow v. *Newell*, 10 Pick. 348, 357

The act of 1824, c. 152, first made the owner of a statutory dam liable under the statute for flowing land below.

Wolcott &c. Co. v. *Upham*, 5 Pick. 292, 294.
Fiske v. *Framingham Mfg. Co.*, 12 Pick. 67.
Shaw v. *Wells*, 5 Cush. 537.
Gile v. *Stevens*, 13 Gray, 146.

There were no changes in the statutes material to the consideration of the questions raised until the revision of 1836, which is as follows: —

Rev. Sts. c. 116:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sect. 2. No such dam shall be erected, to the

injury of any mill lawfully existing either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary by the common law, if no provision relating to mills had been made by statute.

. . . . . .

"Sect. 4. Any person, whose land is overflowed, or otherwise injured by such dam, may obtain compensation therefor, upon his complaint before the court of common pleas for the county where the land or any part thereof lies, provided, that no compensation shall be awarded for any damage, sustained more than three years before the institution of the complaint."

It is apparent that section 1 of chapter 116 of Revised Statutes is the same in legal effect as section 1 of St. 1795, and authorizes flowage, although, unlike the earlier act, without using the word "flow," and that section 4 of chapter 116, of Revised Statutes, like section 2 of St. 1795, gives a person injured by flowage a remedy for the damages thereby sustained. Indeed, not only was it true that only damages caused by flowing could be recovered, —

Palmer Co. v. *Ferrill*, 17 Pick. 58, 66;
McNally v. *Smith*, 12 Allen, 455;
Eames v. *New England Worsted Co.*, 11 Met. 570, —

but also that under the Mill Act such damages could not be recovered for injury to personal property.

Gile v. *Stevens*, 13 Gray, 146.

Rev. Sts. c. 116, sec. 2, in enumerating the cases in which flowage was prohibited, retained the prohibition declared by the court against flowing an existing mill, but not the one against flowing a mill-site on which a mill was in process of construction. In other words, the rule laid down in *Bigelow* v. *Newell*, *ubi supra*, with respect to mill-sites was abrogated by this section.

The court, in *Baird* v. *Wells*, 22 Pick. 312, construed the identical clause now under consideration, viz., "No such dam shall be erected to the injury of any mill lawfully existing," etc.

In that case the plaintiff began the construction of his dam and mill in December, 1836, the defendant in March, 1837. The defendant finished his dam in April, 1837, and by flowing prevented further construction by the plaintiff. The court there said, —

> "The question is, whether the present case is brought within this prohibitory clause of the statute. And it is the opinion of the Court that it is not. At the time the defendants' dam was erected the plaintiff had no existing mill. The defendants' dam was erected in April, 1837; and the plaintiff's mill was not completed until the December after. . . . Nor was the plaintiff's mill site one on which a mill or mill dam had ever before been erected and used."

The Mill Acts, then, up to the enactment of the Revised Statutes allowed a riparian proprietor to flow for mill

purposes the land of others in all cases excepting where such land was occupied by a completed mill or one in process of construction.

The Revised Statutes, as interpreted by the court in *Baird* v. *Wells*, *ubi supra*, extended the right of flowage to land on which a mill was in process of construction, and the decision of the court in that case was immediately followed by an enactment for the purpose of restoring the prohibition against flowing the land of another owner who had first begun to construct his dam.

Baird v. *Wells* was decided in 1840, and in consequence of the decision chapter 18 of the acts of 1841 was enacted to protect mill-sites from flowage:

> "Sect. 1. No mill-dam shall hereafter be erected or raised to the injury of any mill-site upon the same stream, which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing such occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied."

These provisions of the Revised Statutes as modified by the act of 1841, were re-enacted by General Statutes, c. 149, secs. 1, 2, and again by Public Statutes, c. 190, secs. 1, 2:

> "Sect. 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.
>
> "Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or

below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The prohibition against injury in section 2 is manifestly confined to injury to land of another by actually flowing.

In *Storm* v. *Manchaug Co.*, 13 Allen, 10, the question was, —

"Whether, if the plaintiff has begun to raise the dam connected with his mill, intending to raise it to a height which, when completed, would flow the land of the defendants, they have the right, by digging a canal on their own land before it is flowed, to prevent the flowing beyond the height to which the water was previously raised."

The court decided in favor of the defendants, saying, at page 15, —

"For we can see no reason to doubt that the owner

of land adjoining a stream, until his land is flowed by a mill-dam, has all the rights to use it which other land-owners enjoy. His land may be well suited for the creation of a mill-pond, but he is under no obligation to keep it in that condition for the benefit of his neighbor. His common law right is not to be taken from him or limited, unless by a clear provision of the statute.

. . . . . .

"There is nothing in the statute now in force which vests any rights of flowing in the mill-owner before he has actually exercised them; or which gives the land-owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority, in derogation of common law rights of property is not to be extended by construction."

Storm v. *Manchaug*, 13 Allen, 10, 15.

Whether it be said that the mill owner by the act of flowing, acquires an easement, —

Boston & Roxbury Mill Corporation v. *Newman*, 12 Pick. 467;
Talbot v. *Hudson*, 16 Gray, 417;
Isele v. *Schwamb*, 131 Mass. 337, 340;
Isele v. *Bank*, 135 Mass. 142;
Kenison v. *Arlington*, 144 Mass. 456;
FIELD, C.J., in *Turner* v. *Nye*, 154 Mass. 579, 585, 586, —

or that the mill owner at no time acquires any right, title, or interest in the land, —

Lowell v. *Boston*, 111 Mass. 454, 466;
Turner v. *Nye*, 154 Mass. 579, 583;

Williams v. *Nelson*, 23 Pick. 141, 143;
Murdock v. *Stickney*, 8 Cush. 113, 116, —

is immaterial so far as practical results are concerned. In all the cases until the decision of the case at bar, it is conceded that no rights are lost by the owner of the land, and none are gained by the owner of the dam, before flowage takes place.

The state court, in its opinion in the case at bar, said that the statute of 1841 restored the rule which existed prior to the enactment of the Revised Statutes. It does; but the rule was that a dam should not be erected to injure by flowage land on which there was a mill erected or land of another owner who had first commenced to occupy it for mill purposes.

No Massachusetts case was cited by the court which decides or says that under any Mill Act of this state (excepting Rev. Sts. c. 116, sec. 2, modified as soon as interpreted), one proprietor can, by first beginning to occupy his mill-site, flow out a completed mill, and no Massachusetts case was cited to the effect that the word "injury" in this act means anything more than injury by flowage, and no such decisions exist.

The state court admit that a strict construction of the Mill Act would lead to an opposite decision from that of the court in the case at bar, and give the Mill Act a most liberal construction.

But from the earliest cases in Massachusetts, including *Hatch* v. *Dwight*, 17 Mass. 289, the court has looked at the Mill Act as inconsistent with present conditions, and has uniformly declared, as in *Storm* v. *Manchaug*, 13

Allen, 10, and *Murdock* v. *Stickney*, 8 Cush. 113, that, being in derogation of common law rights, it should be construed strictly.

The Supreme Judicial Court, in the case at bar, in support of its interpretation of the statutes cites the case of, —

Storm v. *Manchaug Co.*, 13 Allen, 10–15, —

but in *Storm* v. *Manchaug Co.*, the court say, —

> "we can see no reason to doubt that the owner of land adjoining a stream, until his land is flowed by a mill-dam, has all the rights to use it which the other land owners enjoy. His land may be well suited for the creation of a mill-pond, but he is under no obligation to keep it in that condition for the benefit of his neighbor. His common law right is not to be taken from him or limited, unless by a clear provision of the statute," —

and refer to the rule that existed before the Revised Statutes in these words.

> "Before the revised statutes, if an upper proprietor was building a mill, he was held to so far have appropriated the water privilege that the lower proprietor could not erect a new dam, or raise an old one, to his injury." (Citing *Bigelow* v. *Newell*, 10 Pick. 348.)

There is nothing in this language to indicate that a lower proprietor could, by first commencing the construction of a dam, flow out a mill or dam above, which was completed first. The court in *Storm* v. *Manchaug Co.* then proceed to accurately state the law under the Revised Statutes:

"By a slight and perhaps unintentional change of the phraseology introduced into these statutes, it was held that the law was changed; and that nothing but an existing mill could prevent the lower proprietor from putting a mill-dam upon his own land, although the effect of it might be to destroy an upper privilege which its owner had previously begun to occupy. (*Baird* v. *Wells*, 22 Pick. 312.) This was altered and the old rule restored by St. 1841, c. 18. There is nothing in the Statute now in force which vests any rights of flowing in the mill owner before he has actually exercised them; or which gives the land owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority, in derogation of common law rights of property, is not to be extended by construction."

The decision and language of the case of *Storm* v. *Manchaug Company* is entirely inconsistent with the decision in the state court in the present case.

After having cited *Storm* v. *Manchaug* as above the state court, in its opinion in the case at bar, proceeds as follows: —

"That this is the true construction of the Statutes is further indicated by the language used in other cases. *Dean* v. *Colt*, 99 Mass. 486, 487. *Fitch* v. *Stevens*, 4 Met. 426–428." (Opinion of the Supreme Judicial Court, Record, p. 115.)

In *Fitch* v. *Stevens*, *ubi supra*, the court decided only that a dam was not authorized by the Mill Act unless a mill was built in connection with it. The language of the opinion was as follows: —

"And it was decided in this Court in the case of *Stowell* v. *Flagg*, 11 Mass. 364, after a careful and able examination of these statutes, that no action since the St. 1795, c. 74, would lie at common law against a mill owner for flowing the land of another.

"While we accord entirely with the reasoning and decision of that case, we think the position is to be received with some qualification; and we are of opinion, that, upon a true construction of the spirit and intent of the statutes, no person can avail himself of the privileges conferred by them, nor bring himself within their protection, merely by erecting a dam across a stream running through his land. There must be coupled with such erection the building of a mill for use or there must exist the intent, which shall be capable of proof, forthwith to erect one."

In *Dean* v. *Colt*, *ubi supra*, the plaintiff brought an action of tort against the defendant for flowing back and destroying the plaintiff's wheels and machinery. The plaintiff had lowered his wheel pit, so that by lowering the wheel he might use the unappropriated water power, but did not lower or intend to lower the wheel, continuing to use it as before. Five years later the defendant raised his dam and set the water back to such an extent that while it did not interfere with the plaintiff's wheel at that time, the plaintiff could not lower his wheel without being interfered with by back water. Later the plaintiff lowered his wheel and then the back water interfered with it. The court held that the defendant was not liable in that action, saying, —

"The time when Pollock raised his dam is not material provided it was done before the plaintiff appro-

priated the water power to his own use. Such an appropriation would not be made by merely lowering his wheel-pit, unless he did it as the commencement of an occupation of the power."

Dean v. *Colt*, *ubi supra*, decides merely that the condition at the time of flowing and not at the time of beginning to occupy the lower site is the time of taking.

The court in the case at bar then refers to Washburn on Easements (4th ed.), pp. 336, 337. On page 470 of that edition, not referred to by the court, the learned author has thus carefully stated the limitations of the right to flow a mill-site under the act of 1841 :

"But if one begins in good faith to erect a mill and goes on and completes it within a reasonable time, he is considered as having, by such beginning, appropriated and occupied so much of the water and power of the stream as may be necessary for his mill, so that no one can go on, before he has completed his works, and erect works *below his and gain precedence by so doing*."

The state court, in the case at bar, then completes its reference to Massachusetts cases in the following language : —

"For general discussion of law see, —

Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 43 ;
Fiske v. *Framingham Mfg. Co.*, 12 Pick. 68 ;
Fitch v. *Stevens*, 4 Met. 426 ;
Cary v. *Daniels*, 8 Met. 466 ;
Gould v. *Boston Duck Co.*, 13 Gray, 442 ;

Smith v. *Agawam Canal Co.*, 2 Allen, 355, 356." (Opinion of the Supreme Judicial Court, Record, p. 115.)

In *Fiske* v. *Framingham Mfg. Co.*, *ubi supra*, the court held that an artificial stream is not within the operation of the Mill Act. If there is anything, either in the decision or language of that case, or of the cases of *Fuller* v. *Chicopee Mfg. Co.*, *ubi supra*, and *Fitch* v. *Stevens*, *ubi supra*, which supports the conclusion of the state court in the case at bar, that the beginning of occupation of land fixes the right to flow, we should be pleased to have the defendants in error point it out.

In *Smith* v. *Agawam Canal Co.*, *ubi supra*, the court, at page 357, thus stated the rule under the Mill Act:

> "From these provisions it is an inevitable implication, that, although the right is given indiscriminately to all riparian proprietors, he who erects and establishes his mill does, by his priority of occupation, acquire to that extent a title to the use of the water in the stream prior and superior to that of any other person, and has a right to maintain his dam against all proprietors of lands both above and below his own. *Cary* v. *Daniels*, 8 Met. 466."

It is difficult to see how such language can be distorted into a basis for the interpretation of the statute by the state court in the case at bar.

In *Gould* v. *Boston Duck Co.*, *ubi supra*, the court, in considering a point not involved in the case at bar, thus stated the right to flow under the Mill Act:

> "The necessary consequence is, that when one

proprietor, under the common right, ***has in fact appropriated the power***, the proprietor below is so far restricted in his right of appropriation, that he cannot erect a mill on his own land and flow back the water, to the destruction of the mill already erected by authority of law. This priority of first possession necessarily arises from the nature of appropriation; where two or more men have equal rights to appropriate, and where the *actual appropriation* by one necessarily excludes all others, the first in time is the first by right."

It will be difficult for the defendants in error to do what the state court has failed to do in its opinion, and show how the alleged appropriation of the defendant, by digging a hole on its land, is an actual appropriation of the plaintiff's land and fall two miles above.

In *Judd* v. *Wells*, 12 Met. 504, the court held that after a mill owner had created a mill pond on the land, another land owner had no right to divert or draw off the water.

In *Storm* v. *Manchaug Co.*, *ubi supra*, the court held that until the land was actually flooded the owner acquired no right to flow.

How these decisions can be reconciled with the decision of the state court in the case at bar, or what, if any, of the Massachusetts cases support its decision, that court has utterly failed to show.

The state court attempted to support its opinion in the case at bar by a reference to the decisions in other states under similar statutes, and referred to —

Mills v. *Troost*, 14 Minn. 365–369.

Kelly v. *Natoma Water Co.*, 6 Cal. 105.
Kimball v. *Gearhart*, 12 Cal. 27.
Irwin v. *Strait*, 18 Nev. 436.

The statutes of Minnesota are utterly unlike the Mill Act of Massachusetts. The provisions of the Minnesota statute require a petition on the part of the mill owner, stating both the location of the dam, the height to which it is to be raised, notices to be posted of the appointment of a commission to assess the damages, and the filing of the report of damages and the payment of the damages assessed.

In *Mills* v. *Troost*, *ubi supra*, it was decided that a riparian property owner, under such statute, could not flow out another proprietor who had first commenced the construction of his dam. The very general language in the opinion of the court is without weight on the question presented in the case at bar.

The remaining cases cited by the state court are of those courts whose decisions, by reason of dissimilarity of conditions, have not heretofore been considered as in point upon the construction and interpretation of the Massachusetts Mill Act.

It may be observed in this connection that under the Maine Mill Act, the provisions of which are nearly identical with those of the state of Massachusetts, and not referred to in the opinion in the case at bar, it was held in a very recent case that —

> "This appropriation, however, must be actual to become a right. It cannot be by mere proclamation, nor even by merely marking limits. There must be an actual occupation of the space by a head or pond

of water raised by dams actually constructed of the requisite height and efficiency to raise such head."

National Fibre Board Co. v. *Lewiston & Auburn Electric Light Co.*, 95 Me. 318–322.

We have discussed the interpretation of the Massachusetts Mill Act by the state court in the case at bar at length merely to point out the fact that such has not been considered the meaning of the statute either by the courts or people of this state, and that this court can consider the constitutionality of this fetish taking unembarrassed by the suggestion that other people may suffer by their decision as we are suffering from the one complained of.

We believe that there is no decision to the effect that a statute authorizing a taking by such a method is constitutional.

Except in Massachusetts it is generally required that the taking under a mill act or analogous statute must be certain and definite, either by actual flowing or by petition or statement setting forth the land to be taken or flowed, the height of the dam, or the water rights taken.

Ala. Code (Civil) of Alabama (revision of 1897) secs. 1727 *et seq.*

Ark. Sandels & Hill's, Digest of the (Ark.) Statutes (1894 ed.), c. 58, pp. 734 *et seq.*, secs. 2792, 2794, 2797, 2804, 2805, 2806, 2807.

Cal. Deering's Annotated Codes and Statutes of California, vol. 2 (Civil Code), div. II., pt. IV., title VIII., secs. 1410, 1415, 1416 pp. 263 *et seq.*
Deering's Annotated Codes and Statutes of California, vol. 3 (Civil Procedure), pt. III., title VII., secs. 1243, 1244, pp. 481 *et seq.*

Colo. Mills' Annotated Statutes of Colorado, vol. 1, pp. 1099 *et seq.*, sec. 1716.

Conn. General Statutes, Connecticut (revision of 1902), secs. 982 *et seq.*

Del. Delaware Revised Code (ed. of 1852 as amended 1893), c. LXI., sec. 4.

Fla. Revised Statutes of Florida (ed. 1892), secs. 1544 *et seq.*

Id. Idaho Codes, Civil Code, secs. 2615, 2616; Code of Civil Procedure, secs. 3841 *et seq.*, 3847.

Ill. Hurd's Revised Statutes of Illinois (ed. 1903), c. 92, par. 1, pp. 1244 *et seq.*

Ind. Horner's Annotated Statutes of Indiana (ed. 1901), secs. 883, 884.

Iowa Code of Iowa Annotated (1897), secs. 1921, 1922, *et seq.*

Kan. General Statutes of Kansas (Dassler's Compilation of 1899), c. 66, secs. 3928–3931.

Ky. Carroll's Statutes of Kentucky (1903 ed.), secs. 2712 *et seq.*, also secs. 835–839.

La. Constitution and Revised Laws of Louisiana (Soloman Wolff, 1904 ed.), vol. 1, p. 739, sec. 1497.

Md. Public General Laws of Maryland (1904 ed.), pp. 739 *et seq.*, secs. 104 *et seq.*

Mich. Compiled Laws of Michigan (1897 ed.), sec. 6243.

Minn. Statutes of Minnesota (compiled 1894), c. 31.

Miss. Thompson, Dillard & Campbell's Annotated Code of Mississippi (1892 ed.), c. 92, secs. 2893 *et seq.*

Mo. Revised Statutes of Missouri (1899 ed.), c. 131, secs. 8731 *et seq.*, pp. 2033 *et seq.*

Mont. Montana Codes Annotated (1895) ed.; Code of Civil Procedure, secs. 2211–2228.

Neb. Compiled Statutes of Nebraska (1905 ed.), c. 57.

Nev. Bailey & Hammond's General Statutes of Nevada (ed. 1885), secs. 362 *et seq.*

N.J. General Statutes of New Jersey (1895 ed.), vol. 2, pp. 2093, 2094.

N. Dak. Revised Codes of North Dakota (1895 ed.), c. 35, secs. 5962 *et seq.*

Ohio Bates' Annotated Ohio Statutes (4th ed.), vol. 2, secs. 6416, 6418.

Ore. Bellinger and Cotton's Codes and Statutes of Oregon (ed. 1902), vol. 2, secs. 3935, 3936, *et seq.*, pp. 1318, 1319.

Pa. Brightly's Purdon's Digest, Pennsylvania Statutes (12th ed.), vol. 2, p. 1366, par. 9.

S. Dak. Revised Statutes of South Dakota (official edition 1903), c. 39, p. 999, secs. 841 *et seq.*

Tenn. Shannon's Annotated Code of Tennessee (1896 ed.), secs. 1846, 3437–3443.

Tex. Revised Statutes of Texas (1895 ed.), p. 607, art. 3112.

Utah Revised Statutes of Utah (1898 ed.), c. 65, secs. 3588 *et seq.*

Vt. Vermont Statutes (1894 ed.), c. 159, secs. 3623 *et seq.*

Va. Virginia Code (1904 ed.), c. 61, secs. 1348, 1350, 1351.

Wash. Ballinger's Annotated Codes and Statutes of Washington, vol. 1. secs. 4134, 4135, 4143, 4144.

W. Va. Code West Virginia (4th ed. 1899), c. XLIV., pars. 29 *et seq.*

Wy. Revised Statutes of Wyoming (1899 ed.), sec. 3084.

The master rightly ruled that the plans filed by the defendant with the county commissioners were not notice to the plaintiff of the defendant's intention to build its dam. (Record, pp. 63, 76.)

The plans were filed with the county commissioners under Pub. Sts. c. 190, sec. 52, in a proceeding to secure safety of construction, to which the plaintiff was not a party and of which notice is not given.

VI.

This Mill Act also violates the 14th Amendment because it does not make adequate provision for just compensation to the owner thereof for property taken under the authority of said act.

Adequate provision for making just compensation to the owner of property taken is required by the due process of law clause of the 14th Amendment.

Chicago, B. & Q. R.R. Co. v. *Chicago*, 166 U.S. 226, 241

~~*L.I. Water Supply Co. v. Brooklyn*, 166 U.S. 685–689.~~

~~*Norwood v. Baker*, 172 U.S. 269.~~

Williams v. *Parker*, 188 U.S. 491.

Mt. Hope Cemetery Proprietors v. *Boston*, 158 Mass. 509–519.

If adequate provisions for payment of compensation be made, possession of property or enjoyment of right taken may be had before such payment.

Cherokee Nation v. *Southern Kansas R.R.*, 135 U.S. 641.

Backus v. *Ft. St. Union Depot Co.*, 169 U.S. 557.
Sweet v. *Rechel*, 159 U.S. 380.
Williams v. *Parker*, 188 U.S. 491.

"But the owner is entitled to reasonable, certain and adequate provisions for obtaining compensation before his occupancy is disturbed."

Cherokee Nation v. *So. Kansas R.R.*, 135 U.S. 641, 659.

In other words the "due process of law prescribed by the 14th Amendment requires compensation to be made or secured to the owner."

Norwood v. *Baker*, 172 U.S. 269, 277.

A provision that compensation shall be paid by an individual or business corporation, but affording merely a right of action to obtain it, does not satisfy the constitutional requirement.

Attorney General v. *Old Colony Ry.*, 160 Mass. 62, 90.
Ash v. *Cummings*, 50 N.H. 591.
Steinhart v. *Superior Court*, 137 Cal. 575.
Howe v. *Norman*, 13 R.I. 488.
Powers v. *Bears*, 12 Wis. 213, 221.
Lewis, Eminent Domain, secs. 457, 458.

A provision that compensation shall be paid by the state, county, or city of permanent solvency, supported as it is by public faith and credit, and not "*liable to go up and down like that of an individual*," is security within the constitutional requirement.

Williams v. *Parker*, 188 U.S. 491, 504.
Smeaton v. *Martin*, 57 Wis. 364, 376.
Great Falls Mfg. Co. v. *Garland*, 25 Fed. Rep. 521, 529.
Cooley Const. Lim. (7th ed.) p. 816.

It is not sufficient that the provisions for compensation are such that it will probably be paid.

Conn. River R. Co. v. *County Commissioners*, 127 Mass. 50.

"The compensation must be either ascertained and paid to him [the owner] before his property is thus appropriated or an appropriate remedy must be provided and upon an adequate fund."

Bloodgood v. *Mohawk & H. R. Co.*, 18 Wend. 9–18.
Powers v. *Bears*, 12 Wis. 213.
Lewis, Eminent Domain, sec. 459.

The intimations of this court are fully in accord with the decisions that the responsibility of a private person or corporation is not an adequate fund.

Williams v. *Parker*, 188 U.S. 491.
Sweet v. *Rechel*, 159 U.S. 380–406.

(*a*) *The Massachusetts Mill Act* (*Pub. Sts. c. 190*) *violates the 14th Amendment because it denies the owner of vacant land any compensation whatever for the loss caused by flowing under the authority of said act of that portion of its market value arising from its adaptability for mill purposes.*

Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 43.

In this connection we again refer to the language of some of the decisions cited in pages 31–33 of this brief:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market viewed, not merely with reference to the uses to which it is at the time applied, but what is it worth from its availability for valuable uses."

Boom Co. v. *Patterson*, 98 U.S. 403.
See also *Fales* v. *Easthampton*, 162 Mass. 422.

> "The usufruct of water in a water course is inherent in the ownership of the land through which the water flows. It is often the principal element of value in the real estate of which it is a part. . . .
>
> "The permanent deprivation of this right is a taking or destruction of this property, and a diversion of the water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property."

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548, 560, 561; (s.c.) 154 Mass. 305.

The correspondence between Metcalf and the defendant on pages 49–56 of the record shows that the land purchased of Metcalf by the defendant, at the price of $15,000, was vacant land, valuable principally for mill purposes, although Metcalf owned no mill or other property for which his water power was available.

The defendant has flowed the mill-site of the plaintiff

next above the Metcalf land, having substantially the same natural water power and of exceedingly great value to the plaintiff in connection with its ancient cotton mill and business on the premises of which the mill-site flowed is a part.

While the rights of an owner in and to land and other property are defined by the decisions of the state court, the question whether such rights constitute property is exclusively one for the Federal court.

The decisions of the state court have established the exclusive right of a riparian owner to use the natural fall of a stream through his land for mill purposes, and to use that land, in connection with that natural fall, for mill purposes; and has also established his right to enter on other land and abate any nuisance which interferes with such enjoyment of his property and to have such nuisance restrained by injunction, and to recover damages of any person erecting or maintaining such nuisance.

Such rights constitute property within the meaning of the 14th Amendment, and the Mill Act in question is unconstitutional because it authorizes the depriving of an owner of such rights without compensation.

(*b*) *This Mill Act is also unconstitutional because under its provisions one riparian owner is authorized, by an act of occupation of his land, to thereby acquire the right to flow the land of an upper proprietor, and at a later date to abandon such taking without flowing and without liability to the upper proprietor for damages resulting from such taking, and because it does not give the owner of property taken a right to compensation simultaneous with the taking, but makes such right dependent upon the future volition of the taker.*

Under section 2 of chapter 190, Mass. Pub. Sts., *as now interpreted by the state court* in the case at bar, the act

of occupation of the lower mill-site is a taking of the right to use the land above for mill purposes, that is to say, for the storing of water, and to thereby exclude the owner from the beneficial use and enjoyment of his land above. (Opinion of the Supreme Judicial Court, Record, p. 112.)

But the owner of a mill-site who has commenced occupation as such is under no obligation to continue that occupation and to flow the land of other owners. He may at any time abandon or discontinue his occupation and without any liability to the owners of other lands, who, through fear of flowage and loss of the value of improvements, have been deterred from the full enjoyment of their property. Such owners have no remedy at common law, for their lands have not been flowed or entered upon. They have no remedy under statute, for a complaint cannot be brought before the land is flowed.

Pub. Sts. c. 190, sec. 4:

"Sect. 4. A person, whose land is *overflowed* or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint."

Thompson v. *Moore*, 2 Allen, 350.
Eames v. *New England Worsted Co.*, 11 Met. 570.
Storm v. *Manchaug Co.*, 13 Allen, 10.

And under the complaint provided for by section 4, *only damages caused by flowing* can be recovered.

Palmer Co. v. *Ferrill*, 17 Pick. 58.
Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 46.

An upper proprietor in such case is restricted in the use and enjoyment of his land, between the commencement of occupation of a mill-site and the abandonment thereof by another, because he cannot improve his land without danger of loss of the value of such improvements by flowage. This liability to loss is a prohibition against the use and enjoyment of his land, which, unless just compensation be provided therefor, is unconstitutional.

Re Wall St., 17 Barb. 617.
Portland v. *Lee Sam*, 7 Ore. 397.
Forster v. *Scott*, 136 N.Y. 577.
Driver v. *Western Union R.R.*, 32 Wis. 569.
Edwards v. *Bruorton*, 184 Mass. 529.
Whyte v. *Kansas*, 22 Mo. App. 409.

In *Re Wall St.*, *ubi supra*, a resolution was passed by the Common Council of the city of New York to widen that street, on June 4, 1851; between that date and the report of the committee of estimate and assessment the land owner improved the land to be included in the widening by building on it. The court held that the owner was entitled to recover the value of such improvements, and in its opinion, at pages 624, 625, and 628, say, —

"On the part of the corporation there was no obligation to go on. Was there then on the part of the individual owners any obligation to stand still?

. . . . . .

"To deny to an owner the free enjoyment of his property in the only mode in which it could be enjoyed, as in this case, by building on it, and to do so from

considerations of possible or probable public advantage expected to be realized and that too for a period of indefinite duration, is, to that extent, as much and as truly a taking of private property for the public use as if the entire fee simple were assumed.

. . . . . .

"If he cannot claim, how can they control? If he gets no right to their compensation, how can they get a right to his land? The rights to be just must be mutual and to be constitutional they must be just."

In *Portland* v. *Lee Sam*, *ubi supra*, land owners erected buildings between the appointment of viewers to assess the damages which the owners would sustain by reason of the widening of a street, and the taking of the land by the adoption of their report by the common council.

It was held that the owners were entitled to the value of such improvements, the court saying in its opinion, at page 401, —

"The Common Council were under no obligation to adopt the report made by the viewers or pay for the property proposed to be taken. It was entirely optional with them whether they would go on with the widening of the street or abandon it altogether, and it would be unjust to hold that it was the duty of the respondents to cease working upon their building as soon as the viewers made their report or go on with the improvements at the peril of losing all expenditures incurred by them while awaiting the uncertain action of the Common Council."

In *Forster* v. *Scott*, *ubi supra*, the court held a statute to be unconstitutional which denied compensation to an owner for buildings erected on land included within the

limits of a proposed street as shown by a map filed by the city.

In its opinion, at pages 584, 585, the court in that case say, —

> "Whenever a law deprives an owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of the government may sometimes accidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. . . .
>
> "As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it."

In *Isele* v. *Schwamb*, 131 Mass. 337, the court, in referring to the right to flow in a case in which it had been exercised, say, at pages 339. 340, —

> "That right was acquired by force of law, and the estate of the Sippels became subject to it. They could not destroy nor defeat nor impair it. It was a perpetual servitude to which their land was subject. . . .
>
> "The taking was for a public use for an indefinite time, and therefore in law perpetual; and the true theory of the Constitution as expounded is, that when private property is taken for public use with one hand, full and complete compensation therefor shall be tendered with the other. The right to the compensation is simultaneous with the act of taking."

See also Sabrowski v. Old Col. Ry. Co. 171 Mass 20

(c) *This Mill Act also violates the due process of law clause of the 14th Amendment, because it authorizes the flowing of the land of another and his consequent exclusion from the use thereof for the time between the flowing and the filing and recording of the verdict, usually a period of at least two years, without first requiring the payment of, or any security by attachment or otherwise for, the damages caused during that period, which damages are herein referred to as "past damages."*

The provisions of the Mill Act require a jury to assess past damages, that is, all damages sustained within three years next preceding the complaint to the time of rendering the verdict, also to determine by their verdict what sum, if any, to be paid annually to the complainant, or what sum to be paid in gross, would be a just and reason-

able compensation for all damages occasioned by flowing after the date of the verdict.

Pub. Sts. c. 190, secs. 15, 16, 18:

"Sect. 15. If the jury find by their verdict that the complainant is not entitled to recover any damages, and if such verdict is allowed and recorded, judgment shall be rendered for the respondent.

"Sect. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

. . . . . .

"Sect. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross, would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid."

No attachment can be made to secure a judgment for past damages.

Wight v. *Barnstable Savings Bank*, 123 Mass. 183, 184.

A verdict for past damages is not "allowed and re-

corded" until all questions of law raised at the trial are determined.

Hamilton v. *Farrar*, 131 Mass. 572, 573.

The Mill Act provides no fund or other security for the payment of past damages.

In the larger counties in Massachusetts two years elapse between the bringing of an action in the Superior Court and the trial of the case. At the trial questions of law may be raised which must be determined by the Supreme Judicial Court before the verdict can be "allowed and recorded" within the meaning of section 15.

Hamilton v. *Farrar*, 131 Mass. 572, 573.

The land flowed may have had dwelling-houses or steam mills on it.

McNally v. *Smith*, 12 Allen, 455.
Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 46.

If the Mill Act denies any compensation to the owner for past damages, its constitutionality cannot be seriously maintained. Its failure to require prepayment of such damages, or security for such payment before they are suffered, is equally unconstitutional.

The flowage may utterly ruin the land and valuable improvements thereon and the past damages may be exceedingly great.

It is a well-settled rule of construction in the consideration of such statutes that "the constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done."

Stuart v. *Palmer*, 74 N.Y. 183, 188.

Montana Co. v. *St. Louis Mining & M. Co.*, 152 U.S. 160, 170.
Dexter v. *Boston*, 176 Mass. 247, 251.
White v. *Gove*, 183 Mass. 333, 337, 338.

The Supreme Court of the state of New Hampshire, in the case of *Ash* v. *Cummings*, 50 N.H. 591, held that the Mill Act of that state would have been unconstitutional but for section 4, which provided that —

> "No person or corporation shall derive any title from said proceedings or be discharged from any liability in relation to said terms until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment."

It was held in that case that under section 4 the court would enjoin a mill owner from flowing the land of another without first giving sufficient indemnity to the owner for the damages which might be caused thereby.

In dealing with the contention that the land could be lawfully flowed without payment or adequate security for payment, the court said, on pages 615 and 616, —

> "Suppose the land owner commences proceedings to have his damages assessed as soon as he may, after the thirty days have elapsed — it may be anywhere from one to six months before he can enter the same in court; and then suppose it is referred to the committee at the first term, and they hear the parties and make report at the next term; and suppose judgment should be rendered upon the report at the second term, — the case might be settled in course of a year from the time the land was flowed, though that would be unusually speedy justice when we consider all the

delays to which such suits are liable in the course of adjustment.

"But within and during that year a man's farm may be submerged, he and his family may be drowned out of his dwelling-house like a rat out of his hole, and his castle which the king cannot enter may be taken by storm, by a flood of water; a whole gold mine in Lisbon might be flooded and rendered useless during the whole time; churches and school-houses might be inundated and ruined irretrievably. *In fact, every mischief which a flood of water can do, would or might be done before judgment, without any compensation, and before any remedy could be available.* And then, suppose the committee should find that this flowage was not of public use or benefit to the people of this State, or was not necessary for the use of the mill for which the dam was built, — how would the land-owner get his damages? Or suppose the finding is the other way, and the flowage is held to be of public benefit, &c., and a judgment is finally rendered for the actual damages done and fifty per cent. added, — what guaranty has the land-owner that the mill-owner will be responsible for that judgment when he obtains it? *The mill-owner may be wholly irresponsible when he commences to flow the land. His mill and dam and water-power and all his premises may be mortgaged for their full value before he raises the water upon the land, and he may be utterly worthless, and yet all the hope of compensation the land-owner can have is the hope that sometime in the distant future he may be able to recover a judgment against a worthless mill-owner;* or if the proceeding is terminated the other way, he may, after his property is

ruined, possibly have the privilege restored to him of bringing an action upon the case against a man without means or responsibility. In either case the landowner is forced to the alternative, to use a homely adage, of 'suing a beggar and catching a louse;' and this is the just compensation which the land owner is to receive, seasonably and certainly, for injuries and mischiefs which may have been inflicted upon him without the shadow of right, and from which he may never be able to recover himself.

"This is the construction we are asked to give to this statute. But what would be gained by such a construction? If that was what was intended by this statute, we should be forced to hold that it would be unconstitutional and void; for surely no statute could be held constitutional, which should to such an extent disregard not only the plain precepts of our constitution, but also that voice of natural justice, which speaks so plainly where the constitution is silent."

In most states, taking under the Mill Acts or analogous statutes is not permitted until the damages thereby caused are paid or secured, and usually actual payment is required.

Ala. Code (Civil) of Alabama (revision of 1897) secs. 1727 *et seq.*
Hendricks v. *Johnson*, 6 Porter (Ala.), 472, 502.
Birmingham Traction Co. v. *Birmingham Ry. & Elec. Co.*, 119 Ala. 129.

Ark. Sandels & Hill's Digest of the (Ark.) Statutes (1894 ed.), c. 58, pp. 734 *et seq.*, secs. 2804, 2805, 2806, 2807.

Cal. Constitution of the State of California, art I. sec. 14.
Steinhart v. *Superior Court*, 137 Cal. 575.

Colo. Mills' Annotated Statutes of Colorado, vol. 1, pp. 1099 *et seq.*, sec. 1725.

Conn. General Statutes Connecticut (revision of 1902), sec. 989.

Del. Delaware Revised Code (ed. of 1852 as amended 1893), c. LXI., sec. 4.

Fla. Constitution of Florida (1885), art. XVI., sec. 29.

Ga. *Chattanooga &c. R.R.* v. *Jones*, 80 Ga. 264.
Georgia &c. R.R. v. *Archer*, 87 Ga. 237.

Id. Idaho Codes, Civil Code, secs. 2615, 2616; Code of Civil Procedure, secs. 3854, 3856, 3857.

Ill. Hurd's Revised Statutes of Illinois (ed. 1903), c. 47, pp. 908 *et seq.*; c. 47, par. 10, p. 910.

Ind. Horner's Annotated Statutes of Indiana (ed. 1901), sec. 901.
Constitution of Indiana, art. I, sec. 21 (Horner's Annotated Statutes of Indiana, ed. 1901, sec. 66).

Iowa Code of Iowa Annotated (ed. 1897), sec. 1930.

Kan. General Statutes of Kansas (Dassler's Compilation of 1899), c. 66, secs. 3935, 3939.

Ky. Kentucky Constitution of 1891, secs. 13, 242.
Carroll's Statutes of Kentucky (1903 ed.), sec. 2717, also sec. 839.

La. Constitution of Louisiana (1898), art. 167.

Me. Revised Statutes of Maine (revision of 1903), c. 94, sec. 16.

Md. Public General Laws of Maryland (1904 ed.), p. 740, sec. 108.

Mich. Compiled Laws of Michigan (1897 ed.), sec. 6248.

Minn. Statutes of Minnesota (compiled 1894), c. 31.

Miss. Thompson, Dillard & Campbell's Annotated Code

of Mississippi (1892 ed.), c. 92, secs. 2893 *et seq.*, sec. 2897.

Mo. Revised Statutes of Missouri (1899 ed.), c. 131, secs. 8746, 8747, p. 2035.

Mont. Montana Codes Annotated (1895 ed.), Code of Civil Procedure, sec. 2228.

Neb. Compiled Statutes of Nebraska (1905 ed.), c. 57.

Nev. Bailey and Hammond's General Statutes of Nevada (ed. 1885), sec. 363.

N.H. *Ash* v. *Cummings*, 50 N.H. 591.

N.J. General Statutes of New Jersey (1895 ed.), vol. 2, pp. 2093, 2094.

N. Dak. Revised Codes of North Dakota (1895 ed.), c. 35, secs. 5955 *et seq.*

Ohio Bates' Annotated Ohio Statutes (4th ed.), vol. 2, secs. 3281, 6433.

Ore. Bellinger and Cotton's Codes and Statutes of Oregon (ed. 1902), vol. 2, secs. 3940, 1319.

Pa. Brightly's Purdon's Digest Pennsylvania Statutes (12th ed.), vol. 2, p. 1366, par. 9.

R.I. General Laws of Rhode Island (1896 ed.), c. 122, sec. 10.

S. Dak. Revised Statutes of South Dakota (official ed. 1903), c. 39, p. 1000, secs. 849, 851–852, 855.

Tenn. Shannon's Annotated Code of Tennessee (1896 ed.), secs. 1865, 3437–3443.

Tex. Revised Statutes of Texas (1895 ed.), p. 607, art. 3112.

Utah Revised Statutes of Utah (1898 ed.), c. 65, secs. 3588 *et seq.*

Vt. Vermont Statutes (1894 ed.), c. 159, sec. 3633.

Va. Virginia Code (1904 ed.), c. 61, sec. 1354.

Wash. Ballinger's Annotated Codes and Statutes of Washington, vol. 1, sec. 4135.
Constitution of the State of Washington, art. I., sec. 16.

W. Va. Code West Virginia (4th ed. 1899), c. XLIV., par. 32.

Wy. Revised Statutes of Wyoming (1899 ed.), sec. 3084.

Under the Massachusetts Mill Act of 1795 a land owner, upon the filing of his petition for damages, could obtain an order of the court that the respondent should give security for the payment of all damages which might be assessed. This provision for security first appeared in the act of 1795, c. 74. At that early date the legislature attached some importance to article X. of part 1 of the constitution of Massachusetts; viz.,—

> "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

(*d*) *The Mill Act under consideration in the case at bar* (*Pub. Sts. c. 190*) *also violates the due process of law clause of the 14th Amendment, because it fails to require the payment in advance of damages accruing after the date of such verdict, or to provide any certain and definite fund out of which such damages shall be paid.*

The land owner may elect within three months after the verdict is allowed to take the sum awarded as gross damages.

Pub. Sts. c. 190, sec. 19:

> "Sect. 19. The complainant may in such case, at any time within three months after the verdict is al-

lowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office."

The owner of the dam may, at any time within three months after such election by the land owner, elect to abandon the dam and thereby terminate any liability under the Mill Act for gross damages, ~~accruing after such abandonment~~.

Pub. Sts. c. 190, sec. 20.
Hunt v. *Whitney*, 4 Met. 603.

Section 20 is as follows: —

"Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter."

If, however, the mill owner refuses to pay or secure the payment of gross damages, the only security the land owner has for such payment is a lien on the mill-dam and mill and the land under and adjoining the same; such lien dating back to the institution of the original complaint, that is, to a time not prior to the flowing.

Pub. Sts. c. 190, secs. 22, 24.

Sections 22 and 24 are as follows: —

"Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor."

"Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title which has accrued within the time covered by the lien."

The dam, however, may be of the cheapest construction; the mill may consist of a water wheel and cheap dynamo, and the electrical power thus generated may be sold and transmitted to other owners for the working of their mills. It is obvious that the damages suffered may far exceed the value of the property subject to the lien; and that such property may have been attached for debt for its full value, or incumbered by a large mortgage before the land was flowed or the complaint was brought. The land owner, however, may maintain an action of contract for the gross damages, not against the one who erected the dam, but only against the person who owns or

occupies the mill when the action is brought; for if, before or after the verdict awarding gross damages, the person erecting the dam conveys the premises to another, such owner is relieved from all liability arising from the award for gross damages.

Pub. Sts. c. 190, sec. 23.
Leland v. *Woodbury*, 4 Cush. 245.

Section 23 is as follows: —

"Sect. 23. Such person may maintain an action of contract therefor in the Superior Court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars."

Apparently the execution issued on that judgment can be levied only on the property subject to the lien.

Pub. Sts. c. 190, sec. 24, *supra*.

Since this case was brought legislation has been enacted which subjects other property to levy of the execution.

Rev. Laws, c. 196, sec. 16:

"Section 16. The execution issued on such judgment, *if not otherwise satisfied* may, within thirty days after judgment, be levied on the land so subject to the lien; and the officer may thereupon sell, in the manner provided for the sale of land on execution, such land or so much thereof as is necessary to satisfy the execution and the expenses of the levy. Such sale

shall be valid against any claim which has accrued within the time covered by the lien."

The words "*if not otherwise satisfied*" were in the Mill Act contained in Revised Statutes (compilation of 1836), were dropped from the General Statutes (compilation of 1860) and from Public Statutes (compilation of 1882), which last were in force at the time of the acts complained of in this suit, and at the time of the institution of this suit, and were inserted in Revised Laws (compilation of 1902).

In case the land owner elects to take annual damages, the remedies by lien and action are the same.

The land owner is confined to the remedies afforded by section 28.

"Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining or using of a mill or mill-dam, except as provided in this chapter."

Dean v. *Colt*, 99 Mass. 486.

Since the case at bar was brought an attempt has been made, by the enactment of section 19 of chapter 196 of the Revised Laws, to meet the objection that the remedies provided by the Mill Act are inadequate and unconstitutional.

Rev. Laws, sec. 19:

"Sect. 19. No action shall be maintained at common law for the recovery of damages for the erection, maintenance or use of a mill or mill-dam, if a remedy therefor is provided in this chapter."

The state court, in its opinion in the case at bar, devotes

a few lines to the assertion that the Mill Act is constitutional.

Certainly if the learned chief justice of that court has failed to state any good reason for holding that this Mill Act does not violate the due process of law clause of the 14th Amendment, or to cite cases in support of the court's decision, it will be readily admitted that the cause of the defendants is lamentably weak.

We briefly consider the opinion of the Supreme Judicial Court in the case at bar. (Record, pp. 112, 116.)

> "We do not deem it necessary to consider at any length the constitutionality of this statute. It has often been considered and discussed in previous decisions and it has uniformly been affirmed."

The statement quoted is accurate if limited to the decisions of the Supreme Judicial Court of Massachusetts in cases arising under the state constitution.

It is believed that there is no state or Federal case in which a Mill Act similar to the Massachusetts statute, in failing to require prepayment of full compensation, or security for such payment, before the flowing, has been held to be constitutional.

The state court, in its opinion in the case at bar, thus proceeds:

> "It is urged that the provision for the payment of damages is inadequate. This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain."

The court is mistaken in this statement. The position of the plaintiff in this case before that court was that it

was immaterial whether the taking was under the right of eminent domain or under the power to enact wholesome laws, because in either aspect it had a constitutional right to just compensation.

The state court, in the case at bar, then takes the position that the proceedings under the Mill Act do not constitute a taking of property, or, if a taking, are not under the right of eminent domain, but under the police powers of the state, using the following language: —

> "But whatever may be the interference with the use of a neighboring property by an appropriation of a mill site, it is not a taking under the right of eminent domain. *Murdock* v. *Stickney*, 8 Cush. 113. *Hazen* v. *Essex Company*, 12 Cush. 475. *Lowell* v. *Boston*, 111 Mass. 454, 464. *Turner* v. *Nye*, 154 Mass. 579. *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9."

In *Murdock* v. *Stickney*, *ubi supra*, the state court decided that the Mill Act does not apply to tide mills, and, commencing at page 116 in its opinion, made the statement which probably led to the citation of that case:

> "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. *It is not in any proper sense a taking of the property of an owner of the land flowed*, nor is any compensation awarded by the public. It does not even authorize the mill owner to use the land of another for a reservoir, against his consent; the owner of the land may if he choose, dike

out his meadow, and thereby prevent the flow of the water upon it. . . .

"Whether if this were an original question, this legislation would be considered as trenching too closely upon the great principle, which gives security to private rights, it seems now too late to inquire, such legislation having been in full operation in this state a century and a half, but we think the principle itself is manifest."

In *Hazen* v. *Essex Co.*, *ubi supra*, the court decided that a corporation created by special act was not liable to an action at law for the flowing of land by a dam erected in accordance with such act, and the only remedy was that given under the act of incorporation. The decision of the court was put expressly on the ground that the taking was the exercising of the right of eminent domain.

In *Lowell* v. *Boston*, *ubi supra*, the court, in deciding that the statute authorizing the city to issue bonds and loan the proceeds to owners of land, the buildings upon which were burned, was unconstitutional, said, —

"It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston & Roxbury Mill Corporation and the Salem Mill-dam corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the Legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise," and con-

tinuing the discussion, the court, at page 466, say, "A consideration still more conclusive to this point is, *that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use.* They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt* v. *Whitney*, 4 Met. 603. *Talbot* v. *Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill owner and takes none from the land owner. (*Murdock* v. *Stickney*, 8 Cush. 113; *Storm* v. *Manchaug Co.*, 13 Allen, 10.) In *Murdock* v. *Stickney*, Chief Justice SHAW remarks in reference to the mill acts, 'The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.'"

In *Turner* v. *Nye*, *ubi supra*, the court decided that the statute authorizing the flowage of lands for the purpose of creating a pond for the culture of useful fishes is constitutional, and in the course of its opinion, at page 583, said, with reference to the statute under consideration, —

> "It is to be erected 'upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes so far as the same are applicable in such cases.' The chapter referred to is what is known as the mill act.

Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill owner any right in the land flowed, or take away any right of the land owner. The latter may embank his land and thus stop any flowage of it, or, if he chooses, he may collect of the mill owner damages in gross or annually for the flowage. Until the land owner manifests his election to claim damages, he cannot be compelled by the mill owner to submit his land to be flowed, and until then the only right which the mill owner has as between himself and the land owner, is to maintain his dam without liability to the land owner for damages in an action at law. While the land owner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill owner to maintain his dam."

The proceedings under the Mill Act, whereby the plaintiff lost the right to use its land for general purposes, as well as for mill purposes, and whereby the defendant acquired the right to flow the plaintiff's land and to use it for a mill pond and to take from the plaintiff for the defendant's use more than twelve feet of the fall of the stream on the plaintiff's land, is a taking of property, as held by the decisions of this and other courts.

The statement contained in the foregoing cases cited in the extract from the opinion of the state court in the case at bar, to the effect that an interference with the rights of a land owner, which forces him either to have his lands flowed by a lower owner or to incur the expense of building an embankment and thereby flow it to the same extent, is not a taking, is opposed to the decisions of this

court. Eminent judges of the Supreme Court of Massachusetts have refused to subscribe to it, and it is generally condemned by courts of other jurisdictions as well as by learned authors.

Turner v. *Nye*, 154 Mass. 579, 586.
Kenison v. *Arlington*, 144 Mass. 456, 457.
Isele v. *Bank*, 135 Mass. 142, 144.
Isele v. *Schwamb*, 131 Mass. 337.
Chase v. *Sutton Mfg. Co.*, 4 Cush. 152, 169, 170.
Boston & Roxbury Mill Corp. v. *Newman*, 12 Pick. 467.
Talbot v. *Hudson*, 16 Gray, 417, 425, 426.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.
Lewis, Eminent Domain, sec. 183.

The state court, in its opinion in the case at bar, then asserts that the proceedings are under the police powers, and that the validity of the Mill Act is not dependent on compensation to owners of lands flowed, saying,—

> "It is unnecessary to determine in this case what constitutional rights one has, in reference to damages for an interference under the statutory authority with his right at common law to use the water of a stream without obstruction, where such an interference is permitted in the regulation of the rights of the different owners, as necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff in view of existing conditions."

On the contrary, it was of vital importance for the state court to determine whether the Mill Act does require payment to the owner of land flowed of full compensation for *all* the damages authorized by the proceedings under it, and whether it does make an *adequate provision for the payment of all such damages* by prepayment of the same or security for such payment.

The opinion continues, —

> "It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind."

The language just quoted can be interpreted only to express an opinion that when property is taken in the exercise of the police powers of the state, the constitutional requirements may be satisfied by a provision for compensation which would be inadequate if the same taking had been made under the right of eminent domain. This is manifest error. The state, in the exercise of the police powers, may prohibit, without compensation to the owner, any use of property injurious to the health, morals, or safety of the community; but it cannot, even in such case, take such property without adequate provision for compensation, and much less can it, without compensation, deprive an owner of the right to the beneficial enjoyment of his property for general purposes in order that another person may use such property for a single purpose.

Austin v. *Tennessee*, 179 U.S. 343, 344
Commonwealth v. *Alger*, 7 Cush. 53, 84.
Sweet v. *Rechel*, 159 U.S. 380, 398.
Smyth v. *Ames*, 169 U.S. 466.

Miller v. Horton 152 Mass 540,

Bent v. *Emery*, 173 Mass. 495.
Yates v. *Milwaukee*, 10 Wall. 497.
Pumpelly v. *G.B. & M. Canal Co.*, 13 Wall. 166.
Barney v. *Keokuk*, 94 U.S. 324.

The state court, in the case at bar, concludes its constitutional exposition of the law in the following language: —

> "Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the constitution. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467. *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394."

In *Brickett* v. *Haverhill Aqueduct Co.*, *ubi supra*, the legislature authorized a private aqueduct corporation to take and use the waters of great ponds belonging to the commonwealth as a water supply for the inhabitants of the town of Haverhill, and provided that all damages sustained by the taking of land, water, or water rights should, in case of disagreement with the parties injured, be ascertained and recovered under the Public Statutes of Massachusetts, c. 49, relating to takings for highways, but did not require either the prepayment of compensation or security for such payment. The court in that case sustained the constitutionality of the statute upon the ground that numerous similar statutes had been passed and acquiesced in, and on the further ground that the land owner under Public Statutes, c. 110, sec. 18, was entitled to a warrant of distress to compel the payment of his damages, and if that

was ineffectual, to relief in equity restraining the aqueduct company from committing further damages, and ordering the removal of the dam. In other words, *Brickett* v. *Haverhill Aqueduct Co.* decided that a right of action was a sufficient provision for compensation within the meaning of the state constitution, supplemented, as it was, by a right to restrain further damage if the provision proved ineffectual. It is interesting to note in this connection that the statute afforded the land owner injured by the takings of the aqueduct company no security for the payment of damages, while in highway takings there is the liability of a city or county for such payment; and in the exercise of eminent domain by railroad corporations security is required for the payment of damages and costs before the occupation of the property taken is permitted.

Pub. Sts. c. 112, sec. 97.

Brickett v. *Haverhill Aqueduct Co.* is inconsistent with the Federal decisions. It involved no question of the validity of the acts of the defendant in that case under the Federal Constitution, and its authority is questioned in the very recent case of *The Gloucester Water Supply Co.* v. *City of Gloucester*, 179 Mass. 365.

The notion expressed in the opinion in the case at bar and in some other of the Massachusetts cases, that under the police powers property rights may be taken without compensation (Opinion of KNOWLTON, J., in *Attorney General* v. *Williams*, 174 Mass. 476), has been noticed by this court.

Williams v. *Parker*, 188 U.S. 491.

VII.

The Massachusetts Mill Act violates the 14th Amendment because it authorizes the taking of private property for private purposes.

The 14th Amendment prohibits the taking of private property for any but public purposes.

Cole v. *LaGrange*, 113 U.S. 1.
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112.
Missouri P.R. Co. v. *Nebraska*, 164 U.S. 403.

Taking property from one party who holds it for public use, by another, to hold it for the same public use, is a violation of the 14th Amendment.

Cary Library v. *Bliss*, 151 Mass. 364.

It is evident that if it should be held that the taking of the plaintiff's property was not completed until that property was flowed by the defendant, such taking would be a violation of the 14th Amendment because, at the time thereof, the plaintiff's land and power were devoted by the plaintiff to the same uses for which they were taken by the defendant.

It may be that a Mill Act can be upheld as a valid exercise of the police powers which authorizes one riparian proprietor to flow the land of another when, without such flowage, neither owner could develop any power; or which encourages great manufacturing interests by authorizing flowage, for mill purposes, of tillage or pasture land of comparatively little value, or which provides for a public mill to serve the public needs under conditions of society which would make it difficult to otherwise supply them.

Such considerations do not apply to the case at bar, in which the defendant, having a water privilege with a fall of 38.12 feet, for the purpose of operating its mill for the manufacture of fabrics (Master's Report, Record, p. 42), is attempting to take from the plaintiff 12.88 feet of its privilege of 18.56 feet despite the fact that such privilege was bought, held, and used by the plaintiff for operating its own mill, which is also devoted to the manufacture of fabrics.

The public welfare is not promoted by having the water power of one mill owner grabbed and used by another to operate the latter's mill.

When a Mill Act was first enacted in Massachusetts, water power only was used for operating mill machinery. Now steam and water mills are manufacturing the same kind of goods side by side.

It cannot be seriously contended that if all Mill Acts were wiped out of existence, the demands of the market and the needs of the public would not be served as fully and satisfactorily as at the present time.

The Mill Act under consideration authorizes a riparian proprietor, for the purposes of a water-mill, to flow out and destroy a steam-mill even though the latter antedates in construction the water-mill and is used for manufacturing the same kind of goods.

The public welfare is not promoted by having a mill owner use water power rather than steam power for manufacturing purposes.

The Mill Act under consideration, in its application to cases like the one at bar, cannot be upheld by any real or supposed analogy between the rights of tenants in common and those of riparian proprietors.

In cotenancy the title of each tenant extends to every part

of the whole, and neither cotenant has the right to exclude the other from any part of the common premises.

Each riparian proprietor, however, has the right at common law to exclude all other riparian proprietors from his land or from any use of the water as it flows through his land.

No riparian proprietor has the right to divert the stream from the land of another or flow such land, or send the water down to it in a polluted condition.

Community of interest in the lands of each other, or in the water as it flows through each other's land, is utterly lacking.

The obligation of each riparian owner is merely that of a land owner, to do nothing to interfere with another's rights.

The stream is an incident to the land, and not the land to the stream.

Avery v. *Vermont Electric Co.*, 75 Vt. 235.

The case at bar is readily distinguishable from the irrigation and drainage cases, in which one of many owners in severalty of a large tract of property is compelled to pay his just share of the expense of improving the entire tract when such improvement would otherwise be impracticable. Such regulation of the rights of ownership is based upon considerations of public welfare.

Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112.

Wurtz v. *Hoagland*, 114 U.S. 606.

It is likewise distinguishable from those cases in which, where a general condition has made it almost essential to

the growth of a state that land owners should have the right to cross the lands of other owners to obtain a supply of water necessary to the use of the land, a statute authorizing them to do so has been upheld.

Clark v. *Nash*, 198 U.S. 361.

In *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9, this court sustained a Mill Act which, as is most fully set forth in *Ash* v. *Cummings*, 50 N.H. 591, required an adjudication of public utility, prepayment of damages or security for such payment, and which prohibited the erection of a dam affecting any mill on the same stream. The language of this court in the opinion is significant:

> "The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 116."

A statute which deprives a mill owner of the right to develop a natural water power on his land does affect his mill. Ellis v. Hooker Co. v. Williams. 36 Conn. 310, *Occum Co.* v. *Sprague Mfg. Co.*, 35 Conn. 496.

The decision in *Head* v. *Amoskeag Mfg. Co.* should at least be limited to the class of statutes under consideration in that case.

Thus limited it does not sustain the constitutionality of the Massachusetts Mill Act in its application to the case at bar, because the Massachusetts Mill Act, unlike the New Hampshire statute, does not require any adjudication of

public utility, and does not require, in advance of flowing, any payment, or security for the payment, of compensation for "past damages," so called, and does not require, in advance of the flowing, any payment, or adequate security for the payment, of compensation for the damages occurring after verdict, and because the Massachusetts Act does authorize the flowing out and destruction of a natural water power forming a part of a mill-site on which there is in actual operation and use an ancient mill, for the working of which the water power destroyed was bought, intended, and needed, and does authorize the appropriation of that power which is taken from the owner to the private use of the taker for the very purposes for which the owner bought, needed, and intended it.

In considering the constitutionality of the Massachusetts Mill Act, present conditions may well be held to render a statute unconstitutional which, many years before, under entirely different conditions, might be held to be constitutional, just as the conditions in one state may support a statute which in a different state, under different conditions, would clearly be invalid.

Clark v. *Nash*, 198 U.S. 361.

In *Stowell* v. *Flagg*, 11 Mass. 364, at 368, the court say, —

> "I cannot help thinking that this statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the scarcity of them, bore much greater value, compared to the land used for the purposes of agriculture, than at present. But with this we have nothing to do. As the law is, so we must declare it."

The following cases are opposed to the view that flowing under such a Mill Act as the one in question can be upheld as a taking for a public use or for the public welfare: —

Ryerson v. *Brown*, 35 Mich. 333.
Water Power Co. v. *Circuit Judge*, 133 Mich. 48.
Tyler v. *Beacher*, 44 Vt. 648.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.
Gaylord v. *Sanitary District*, 204 Ill. 576.
Sadler v. *Langhorn*, 34 Ala. 311.
McCulley v. *Cunningham*, 96 Ala. 583.
Loughbridge v. *Harris*, 42 Ga. 501.
Crenshaw v. *River Co.*, 6 Rand. 245.

The following cases contain an intimation that if it were a new question Mill Acts would be held to be unconstitutional: —

Jordan v. *Woodworth*, 40 Me. 317.
Flemming v. *Hull*, 73 Iowa, 598.
Harding v. *Funk*, 8 Kan. 315.
Miller v. *Troost*, 14 Minn. 365.
Fish v. *Horicon Iron Co.*, 10 Wis. 351.
Atty. Gen. v. *Eau Claire*, 37 Wis. 400.
Murdock v. *Stickney*, 8 Cush. 113.

By the 14th Amendment the validity of the constitutions and statutes of the states then or thereafter existing were made subject to the test of the due process of law clause of the 14th Amendment as interpreted by the Supreme Court of the United States.

Neal v. *Delaware*, 103 U.S. 370.

Kaukauna Water Power Co. v. *Green Bay & M. Canal Co.*, 142 U.S. 254.
Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226, 239.
Wood v. *Fitzgerald*, ~~103 U.S. 370.~~ 3 Oregon 568
Portland v. *Bangor*, 65 Me. 120.

While peculiar local conditions may exist in one state which give a public character to a use by one person of the land of another and justify a statute in that state which would be clearly unconstitutional if enacted under dissimilar conditions, —

Clark v. *Nash*, 198 U.S. 361;
Wurtz v. *Hoagland*, 114 U.S. 606, —

yet the 14th Amendment protects the property rights of the citizens of the United States in every state by prohibiting the taking of the same for private purposes and by requiring an adequate provision for the payment of full compensation to owners deprived of property rights either by the exercise of the right of eminent domain or of the police powers.

This court, therefore, in dealing with the case at bar, is unaffected by considerations of contemporaneous construction and acquiescence which have led different state courts to diverse conclusions.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226, at page 239, where this court say, —

"In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396 (1 L.R. A. 688), the late Mr. Justice JACKSON, while circuit judge, had occasion to consider this question. After full consideration that able judge said: 'What-

ever may have been the power of the states on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson* v. *Central Passenger Railway*, 21 Fed. Rep. 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep. 997."

A Mill Act authorizing an interference with private

property rights, by flowing without prepayment of compensation or security for such payment, cannot, in the Federal sense, be a violation of the 14th Amendment if enacted in New Hampshire, and be in accord with that amendment if enacted in Massachusetts.

Ash v. *Cummings*, 50 N.H. 591.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.

Neither can a Mill Act enacted in Michigan be a violation of the 14th Amendment because of recent enactment and a compliance with it in Massachusetts because of ancient origin.

Ryerson v. *Brown*, 35 Mich. 333.
Water Power Co. v. *Circuit Judge*, 133 Mich. 48.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Murdock v. *Stickney*, 8 Cush. 113, 116.

Nor can a Massachusetts statute be held constitutional in spite of the ambiguity in the act of taking, and a Maine act unconstitutional by reason of the same ambiguity.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Hamor v. *Bar Harbor Water Co.*, 78 Me. 127.

Neither, under the 14th Amendment, can a given use under similar conditions be upheld as a public one for the public welfare in Massachusetts and as a strictly private one in Vermont.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.

Nor can this court, which has refused to follow its own earlier decisions conflicting with the constitution, —

Legal Tender Cases, 12 Wall. 457, 553, —

be expected to regard the opinions of the state courts as of controlling force in the decision of the Federal questions involved in the case at bar.

A decision that the Mill Act in question is unconstitutional will not seriously affect vested interests.

Title to the water powers has been fixed by purchase, user, and acceptance of damages.

Lewis, Eminent Domain, sec. 181.

Respectfully submitted,
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SUPPLEMENTAL.

Laches and Waiver.

The defendant's claim of laches is untenable. (Record, pp. 64, 67.)

Twenty-eighth ruling requested by defendant and refused. (Record, pp. 79, 80.)

Attorney General v. *Algonquin Club*, 153 Mass., 447, 453.
Linzee v. *Mixer*, 101 Mass., 512, 527.

The record does not support the statement that the plaintiff filed a complaint for damages under the Mill Act.

Waiver is not a Federal question.

Electric Co. v. *Dow*, 166 U. S., 489.
Pierce v. *Somerset Ry. Co.*, 171 U. S., 641.

Filing such a complaint is not a waiver under the Massachusetts rule.

Moore v. *Sanford*, 151 Mass., 285.

APPENDIX.

MASSACHUSETTS STATUTES.

PROVINCE LAWS, 1709–1710, c. 1.

An act for the upholding and regulating of mills.

Whereas frequently there are divers partners, owners of mills erected for the common use and benefit of the respective towns wherein they are, and ofttimes improved by the inhabitants of neighboring towns, and forasmuch as by reason of the disagreements death or decay of some of the partners, or perplexity by entail among their descendants, mills sometimes fall to despair and are rendered useless and unserviceable, if not totally demolished, to the hurt and detriment of the public as well as loss to (the) other (the) partners who stand ready to advance their parts of the charge for repairing, mending or rebuilding of the same, be it therefore enacted by his excellency the governor, council and representatives in general court assembled, and by the authority of the same,

That when and so often as it shall happen any mill or mills, mill dam, flood gates, *sluces*, running gear or appurtenances, to be demolished, broken, worn out or stand in need of repair and amendment, it shall and may be lawful to and for any one or more of the partners on knowledge thereof, to notify and summon a general meeting of the whole at the said mill or mills on a certain day (or) (and) time within 15 days next after the issuing of such notification or summons, to consult and agree about

the rebuilding or repairing of such mill or mills or appurtenances or defects therein, to make them serviceable.

And if any partner being so notified shall neglect to attend such meeting, or being met shall refuse to agree with the major part of the interested for repairing, rebuilding and fitting up of such mill or mills, so as to make them serviceable, or to pay his part of the cost and charge thereof, the rest of the partners being the major part of the interested may direct and cause the same to be done, and shall be reimbursed and pay such sum or sums as they or any of them shall advance and disburse thereon over and above their own respective shares and proportion with interest for the same in interim, out of said mill or mills or the profits or earnings thereof, and it shall and may be lawful for them and they are hereby empowered to demand, sue for, recover, and receive the same accordingly: any law, usage or custom to the contrary notwithstanding.

And be it further enacted by the authority aforesaid,

That every miller shall be provided of scales and weights to weigh grain to and from the mill if desired; and the toll for grinding all sorts of grain shall be 1/16th part and no more, any law, usage or custom to the contrary notwithstanding: provided That nothing herein contained shall be construed to annul or make void any particular contract or contracts made or to be made respecting the repairs of any mill or mills.

Passed June 17, published June 18.

PROVINCE LAWS, 1728–1729, c. 4.

An act in addition to and rendering more effectual an act entitled "An act for the upholding and regulating of Mills" made and passed at a session of the Great and General Court or Assembly begun and held at Boston upon Wednesday the 25th day of May in the 8th year of the reign of the late Queen Anne, Annoque Domini 1709.

Whereas great complaint is made by inhabitants of the towns of Boston and Charlestown that they are misused by the millers in not grinding their corn seasonably and oft-times detaining it for a long time under ground, to their great damage, and also that they are very much defrauded by the millers in taking unreasonable toll:

Be it therefore enacted by the Lieutenant Governor, Council and representatives in general court assembled and by the authority of the same That every miller within the towns of Boston and Charlestown who shall not be provided with suitable scales and weights, sealed as the law directs, for weighing corn and meal in his mill, within the space of two months after the publication hereof, shall forfeit and pay the sum of ten pounds; one half to His Majesty for and towards the support of this government, and the other half to him or them that shall inform and sue for the same in any court of record in the countys of Suffolk or Middlesex.

And be it further enacted, That every miller in the towns of Boston and Charlestown who shall not be provided with suitable scales, weights, sealed as the law directs for the end aforesaid, and shall continue in the neglect thereof after the expiration of the said two months, shall forfeit and pay the sum of five pounds for every month he shall con-

tinue in such neglect, to be recovered and disposed of as is hereinbefore mentioned; and if any miller in the said towns of Boston and Charlestown after the expiration of the said two months do or shall presume to take a greater quantity of toll than a sixteenth part for any sort of grain by him ground, and be thereof convicted, he shall forfeit and pay for each offence the sum of five pounds, to be recovered and disposed of in manner as aforesaid; and if any miller in the said towns of Boston and Charlestown shall refuse to weigh corn, grain or meal brought or carried from his mill when desired, he shall for every such refusal forfeit and pay the sum of five shillings, to be recovered before any justice of the peace within the counties of Suffolk or Middlesex, by him or them that shall inform or sue for the same,

And be it further enacted, That when any of the inhabitants of the towns of Boston or Charlestown, shall send any grain to be ground at the mills for the use of their families, the miller or millers shall receive into the mills all such grain, and within the space of three days at least, take care that the same be ground, on pain of forfeiting the sum of ten shillings for every such neglect, and the sum of five shillings more for every day such grain shall be unground (except in extraordinary cases the mill is prevented working) to be recovered before any of His Majesties justices of the peace in the counties of Suffolk and Middlesex.

Passed June 19, published June 24.

PROVINCE LAWS, 1713–1714, c. 9.

An Act in addition to the Act for upholding and regulating of Mills.

Whereas it has been found by experience that, when some persons in this province have been at great cost and expense for building of mills serviceable for public good and benefit of the town, or considerable neighborhood, in or near to which they have been erected; that *in raising a suitable head of water for that service, it hath sometimes happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mills or mill, whereby several controversies, and law suits have arisen: for prevention whereof for the future, —

Be it therefore enacted by his excellency the Governor, Council and Representatives in General Court assembled, and by authority of the same, That where any person or persons have already, or shall hereafter, set up any water mill or mills upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, where upon such mill or mills, is or shall be erected or built; that then such owner or owners shall have free liberty to continue and improve such pond for their best advantage, without molestation. And if any person or persons find themselves aggrieved and damnified in their propriety of lands, by its being flowed by the owner or occupant of such mills stopping or raising the water, that in every such case, the party so damnified in his propriety, upon application for relief to the Court of General Sessions of the Peace in the county where such mills or pond is; the said Court be and hereby are empowered to sue out a warrant directed to the sheriff of the same county,

to summon and empanel a jury of good and lawful men at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of the peace, to a faithful indifferent appraisal of the yearly damage done to the person complainant, by flowing his or their land as aforesaid.

STATUTES 1795, c. 74.

An Act for the Support and Regulation of Mills.

Whereas the erection and support of Mills, to accommodate the Inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special Provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors — Therefore —

Sec. 1st. *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the Authority of the same*, that where any person hath already erected or shall erect any water mill on his own land, or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water, and in so doing any land should be flowed not belonging to the owner of such mill, it will be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner, and on the terms hereinafter mentioned.

Sec. 2d. *And be it further enacted*, that if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said court shall issue a warrant

to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the same county not interested, such sheriff or coroner to be named by the court, directing him to summons and impanel a jury of twelve good and lawfull men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the case; and their verdict, being returned by the officer to the same court, and there allowed and recorded, shall be a sufficient bar to any action to be brought for any such damages. And it shall be in the power of said Court to assess such sum to the officer, for his services, as they may judge reasonable.

Sec. 3d. *And be it further enacted*, that such verdict and judgment thereon so recorded, shall be the measure of the yearly damages, until the owner or occupant of such mill, or the owner or occupant of such lands so flowed, shall, on a new complaint to the said court of the county, and by the form of process before prescribed, obtain an increase or decrease of the said damages. And the party intitled to any such yearly damages, whether the party to the record, his heirs, executors, administrators or assigns, may have an action of debt grounded on such record, to recover the same. And the party prevailing in any complaint or action aforesaid shall be allowed his full legal costs, though the damages so assessed or debt recovered, shall not amount to the sum of four pounds.

Sec. 4th. *And be it further enacted*, that if any person, whose land shall be flowed as aforesaid, shall, on his filing his complaint for ascertaining or increasing his damages, or on bringing his action of debt as aforesaid, move the

said court to direct the owner or occupant of such mill to give security for the payment of the said damages from time to time, as they shall become due; and in that case, the said owner or occupant of such mill shall neglect or refuse to give such reasonable security as said court shall order, he shall have no benefit of this Act, but shall be liable to be sued for so flowing the lands of the complainant or plaintiff, in the same manner as though this Act had not been passed. And when the said jury shall so inquire of the said yearly damages, they shall also inquire and make return in their said verdict, what portion of the year the said lands ought not to be so flowed; and during such portion of the year as the said jury shall certify in their verdict, that the public convenience and the circumstances of the case do not justify such flowing, and the said verdict being accepted by the court, this Act shall in no manner authorize the said owner or occupant of such mill so to flow the said lands of others.

. . . . . .

Sec. 8. *And be it further enacted*, that every miller shall be provided with scales and weights to weigh corn, grain and meal to and from the mill, if required; and if he shall neglect to keep such scales and weights, or refuse so to weigh corn, grain and meal, when required, he shall be fined for each neglect or refusal, not exceeding five dollars, to be recovered, with costs, by action of debt by the parties suing, to his own use, before any Justice of the Peace of the county wherein the offence shall be committed.

Sec. 9. *And be it further enacted*, that the toll for grinding all sorts of grain shall not exceed one sixteenth part thereof.

Sec. 10. *And be it further enacted*, that this Act shall take effect and be in force on and after the first day of July

next, and that an Act passed A.D. seventeen hundred and six for the upholding and regulating of mills, and an Act made in addition thereto A.D. seventeen hundred and thirteen, and a third Act made in further addition thereto A.D. seventeen hundred and twenty-eight, shall on and after that date be repealed, except so far as they shall respect any complaints, actions, or meetings then pending by force thereof. Approved Feb. 27, 1796.

REVISED STATUTES OF MASSACHUSETTS, C. 116.

Of proceedings for the support and regulation of mills. Erection and regulation of mills.

Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

Sect. 2. No such dam shall be erected, to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary by the common law, if no provision relating to mills had been made by statute.

. . . . . .

Sect. 4. Any person, whose land is overflowed, or otherwise injured by such dam, may obtain compensation

therefor, upon his complaint before the court of common pleas for the county where the land or any part thereof lies, provided, that no compensation shall be awarded for any damage, sustained more than three years before the institution of the complaint.

Sect. 5. The complaint shall contain such a description of the land, alleged to be flowed or injured, and such a statement of the damage, that the record of the case shall show, with sufficient certainty, the matter that shall have been heard and determined therein.

. . . . . .

Sect. 8. The respondent may plead in bar of the complaint, that the complainant has no estate or interest in the land, alleged to be flowed or injured, or that the respondent has a right to maintain his dam, for an agreed price, or without any compensation, or any other matter, which may show that the complainant cannot maintain the suit; but he shall not plead in bar of the complaint, that the land therein described is not injured by such dam.

. . . . . .

Sect. 15. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage, occasioned to his other land, by the dam, as well as the damage occasioned to the land overflowed, and they shall also allow, by way of set-off, the benefit, if any, occasioned by such dam to the complainant, in relation to his said lands.

. . . . . .

Sect. 17. If the jury find that the complainant is entitled to recover any damages, they shall assess the amount of such damages, sustained within three years next preceding the institution of the complaint, and down to the time of rendering the verdict, and if the verdict is allowed

and recorded by the court, the complainant shall have judgment and execution.

. . . . . .

Sect. 19. The jury shall also ascertain and determine by their verdict, what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that shall be thereafter occasioned by the dam, so long as it shall be used in conformity with the verdict, and also what sum in gross would be a just and reasonable compensation for all the damages to be thereafter occasioned by such use of the dam, and for the right of maintaining and using the same forever, in manner aforesaid.

Sect. 20. The complainant in such case, at any time within three months after the verdict is allowed and recorded, may elect to take the sum in gross, so awarded by the jury, for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor, and if he shall make such election, he shall, within the said three months, cause the same to be entered on the record of the case in the clerk's office.

Sect. 21. The owner or occupant of the mill or dam in such case shall, within three months after such election is entered on the record, pay to the complainant, or secure to his satisfaction, the sum so due for the perpetual right to maintain the dam, with interest from the time of the verdict; and after the expiration of said three months such owner or occupant shall lose all benefit of the provisions contained in this chapter, until the payment of said damages and interest.

Sect. 22. If the complainant shall not, within the said three months, cause an entry of his election to be made on the record, as before provided, he and all persons

claiming under him shall be entitled to demand and receive, from whoever shall be the owner or occupant of the mill, the annual compensation so established by the jury, so long as the dam shall be kept up and maintained, unless the sum due in that behalf shall be increased or diminished, upon a new complaint, as hereinafter provided.

Sect. 23. The person who shall be entitled to receive the said annual compensation, or gross damages, shall have a lien therefor from the time of the institution of the original complaint, on the mill and mill dam with their appurtenances, and the land under and adjoining the same and used therewith, provided, that such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

Sect. 24. The party, entitled to the said annual compensation or gross damages, may maintain an action of assumpsit or debt therefor, in the court of common pleas, against the person who shall own or occupy the mill when the action is brought, and shall therein recover the whole sum due and unpaid for the three years then last past, whoever may have owned or occupied the mill during that time, and the plaintiff shall be entitled to his full costs in such suit, although the sum recovered shall not amount to twenty dollars.

Sect. 25. The execution issued on such judgment, if not otherwise satisfied, may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell the same, or so much thereof, as shall be necessary to satisfy the execution, and all charges of levying it, and he shall proceed in making such sale, in like manner in all respects as is provided with regard to the sale on

execution of a right to redeem real estate that is mortgaged.

. . . . . .

Sect. 29. Every verdict, rendered in any proceeding under this chapter, shall be under the control of the court to which it is returned, and in like manner as in trials at the common law, and may be set aside for any sufficient cause; and in such cases a new trial shall be had, upon a new warrant or otherwise, as the case may require.

Sect. 30. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining or using any mill or mill dam, except as is provided in this chapter.

. . . . . .

Sect. 59. Every miller, occupying and using a grist mill, shall be provided with scales and weights, or a vibrating steel yard, to weigh corn, grain and meal, to and from the mill, if required; and if he shall neglect to keep himself so provided, or shall refuse so to weigh corn, grain or meal, when required, he shall, for every such neglect or refusal, forfeit and pay to any person, who shall sue therefor, a sum not exceeding five dollars, to be recovered in an action on the case.

Statutes 1841, c. 18.

An Act in relation to direction and regulation of Mills.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

Sect. 1: No mill-dam shall hereafter be erected or raised to the injury of any mill site upon the same stream,

which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing said occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied.

Sect. 2: So much of the second section of the one hundred and sixteenth chapter of the Revised Statutes as is inconsistent with the provisions of this act, is hereby repealed.

Approved by the Governor, Feb. 10, 1841.

GENERAL STATUTES, c. 149.

Sect. 1, Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

Sect. 2, No such dam shall be erected to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill-site on the same stream, on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall any mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof; *provided*, that such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream shall be applied; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority, from the owner, as would be neces-

sary by the common law if no provision relating to mills had been made by statute.

PUBLIC STATUTES OF MASSACHUSETTS, C. 190.

Erection and Maintenance of Mills and Mill-Dams.

Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

Sect. 3. The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury.

Sect. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation there-

for upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

Sect. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

Sect. 6. The complaint may be filed in the court in term time, or in the clerk's office in vacation, and in either case notice thereof shall be given to the owner or occupant of the mill by delivering to him, or leaving at his dwelling-house, an attested copy of the complaint; or if he is not found within the commonwealth, and has no dwelling-house therein, by leaving such copy at the mill in question fourteen days at least before the complaint is to be heard; or the complainant may, fourteen days at least before the sitting of the court to which his complaint is brought, cause the owner or occupant of such mill or dam to be served with an attested copy of the complaint by delivering or leaving such copy in like manner as when the complaint is filed as aforesaid.

Sect. 7. The notice shall be served by an officer authorized to serve other civil processes between the same parties.

Sect. 8. The respondent may answer in bar that the complainant has no estate or interest in the land alleged to be flowed or injured, that the respondent has a right to maintain his dam for an agreed price or without any compensation, or any other matter which may show that the complainant cannot maintain the suit; but the respondent shall not answer that the land described is not injured by the dam.

Sect. 9. If a plea or answer is filed by the respondent, the replication and other pleadings, and the trial of the issue, whether of law or of fact, shall be conducted in like manner as in actions at common law.

Sect. 10. If an issue is decided in favor of the respondent, or if the complainant becomes nonsuit or discontinues, the respondent shall be entitled to his costs, to be taxed as in civil actions.

Sect. 11. If the owner or occupant of the mill or dam, after due notice, is defaulted or offers no legal objection, or if an issue is decided in favor of the complainant, the court shall issue a warrant for a jury to hear and determine the matter of the complaint.

Sect. 12. Such warrant shall be directed and served, and the jurors shall be drawn, summoned, and returned, in the manner provided in chapter forty-nine with respect to a jury returned on the complaint of a person aggrieved by the laying out of a highway, and the jurors shall be required to attend under a like penalty, and the proceedings for supplying a deficiency of jurors and all other proceedings in the case shall be substantially the same as are provided in said chapter.

Sect. 13. If the parties so agree by writing filed in the case, the trial may be had before a jury in the superior court as in other civil actions, and in such case, if either party requires it, the jury shall view the premises alleged to be injured, subject to such regulations and terms as the court may prescribe.

Sect. 14. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned by the dam to his other land, as well as the damage occasioned thereby to the land overflowed; and they shall also allow by way of set-off any benefit

occasioned by such dam to the complainant in relation to his lands.

Sect. 15. If the jury find by their verdict that the complainant is not entitled to recover any damages, and if such verdict is allowed and recorded, judgment shall be rendered for the respondent.

Sect. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

Sect. 17. If it is alleged in the complaint that the dam is raised to an unreasonable height, or that it ought not to be kept up and closed during the whole year, the jury shall decide how much, if any, the dam shall be lowered, and also whether it shall be left open during any part of the year, and, if so, during what part, and shall state such decision as a part of their verdict.

Sect. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

Sect. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for

the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office.

Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

Sect. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner or occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

Sect. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or

occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars.

Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

Sect. 25. Any person entitled to the premises so sold may redeem the same at any time within one year after the sale, upon paying to the purchaser, or to the person holding under him, the sum paid therefor, with interest at the rate of twelve per cent a year.

Sect. 26. The court to which a verdict upon a complaint for flowing land is returned may set it aside for any sufficient cause, and may grant a new trial to be had upon a new warrant or otherwise as the case may require.

Sect. 27. The party prevailing upon such a complaint shall be entitled to his full costs, except where it is otherwise expressly provided. The court shall award a reasonable compensation to the person who presides at the trial, when it is had before a sheriff's jury, and to the officer who executes the warrant, and the amounts so awarded shall, with the pay of the jurors and other like charges, be advanced by the complainant, and taxed and allowed in the bill of costs.

Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter.

. . . . . .

Duties and Compensation of Millers.

Sect. 71. Every miller occupying and using a grist-mill shall be provided with scales and weights or with a vibrating steelyard to weigh corn, grain, and meal, to and from the mill, if required; and if he neglects to keep himself so provided, or if he refuses so to weigh corn, grain, or meal, when required, he shall for every such neglect or refusal forfeit to any person who sues therefor a sum not exceeding five dollars, to be recovered in an action of tort.

Sect. 72. The toll for grinding any sort of grain shall not exceed one-sixteenth part thereof.

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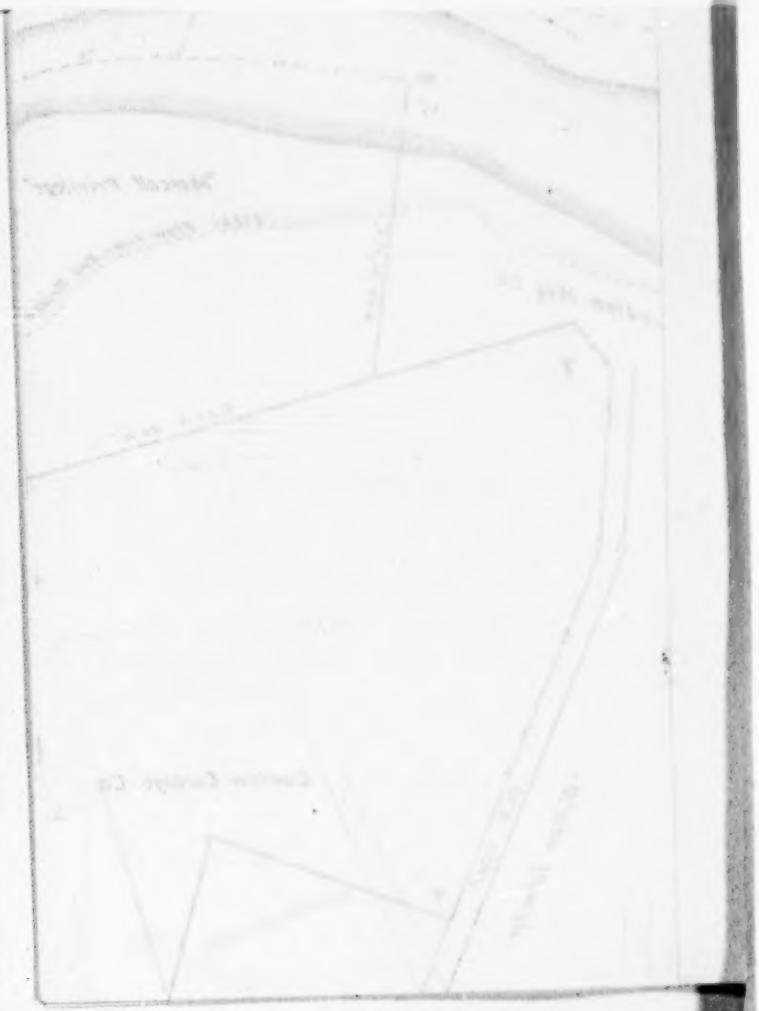

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 73.

THE OTIS COMPANY,
PLAINTIFF IN ERROR,

v.

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW CORDAGE COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Motion of the Plaintiff in Error.

And now comes the plaintiff in error, and moves this Honorable Court to amend the judgment herein, by ordering the final disposition of the plaintiff's bill to be deferred, pending the determination of the plaintiff's right to damages either in the proceedings under the statute or under said bill ; and, in support of said motion, says that the trial of the pending bill of complaint before the master actually occupied twenty-four days : that the preparation therefor consumed

a very much longer period; that the actual cash disbursements made by the plaintiff for the trial thereof in the state courts, including compensation to counsel, witnesses, experts, stenographers, and similar incidentals, exceeded twenty-five thousand dollars ($25,000); and that in case the plaintiff's bill should be dismissed without prejudice, and the state court should give to the Mill Act an interpretation violating the plaintiff's right to just compensation, the plaintiff, in order to protect its aforesaid constitutional right, would be put to great expense and delay incidental to bringing and trying another and similar bill of complaint to establish the facts and present the constitutional question disclosed by the record in the present suit, and further says that the judgment so amended will leave the State Court entirely free in the case at bar to establish the rule of damages under the statute if it sees fit so to do.

Byd B. Jones
of Counsel for plff in error

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. MARCH 1906.

I, Boyd B. Jones, of counsel for the plaintiff in error, on oath depose and say, upon my personal knowledge, that the facts stated in the foregoing motion are true, before me.

Charles M. Dowse
Notary Public.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE OTIS COMPANY, PLAINTIFF IN ERROR
vs.
THE LUDLOW MANUFACTURING COMPANY AND THE LUDLOW CORDAGE COMPANY. } No. 73.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This case was begun in the Superior Court for the County of Suffolk, in the Commonwealth of Massachusetts by a petition in equity whereby the plaintiff in error sought to enjoin the defendant, the Ludlow Manufacturing Company, from maintaining a dam erected by it across the Chicopee River, a non-navigable stream, at Red Bridge, so called, in the County of Hampden, and Commonwealth aforesaid, to such a height as will cause a dam and other structures of the plaintiff in error about two miles above upon the same stream to be flooded and injured.

The case was referred to a special Master who found the facts in the case and reported his findings to the Superior Court, whereupon said Superior Court reserved and reported the case and all questions of law therein, including those raised by the objections and exceptions of the parties, for the consideration of the Supreme Judicial Court of said Commonwealth. The case was thereupon argued before said Supreme Judicial Court, and it was ordered by said Court that entry should be made in the Superior Court "Bill dismissed with costs." Such entry having been made, the plaintiff in error brought its petition in this court.

In connection with the erection and maintenance of its said dam, the defendant justifies its proceedings under the Mill Act of said Commonwealth.

The plaintiff contended: that notwithstanding the fact that the defendant first commenced the construction of its dam, the plaintiff, although beginning subsequently, having first completed its dam and put in operation a mill was entitled to the relief prayed for; and that if it should appear that by first commencing the erection of its dam the defendant had acquired the right by reason of priority of occupation to maintain the same under the Mill Act of said Commonwealth, said Mill Act so construed is unconstitutional, and for these reasons it was entitled to the relief which it sought.

The following facts are material:

Prior to October 1898 the defendant had determined to erect a dam (Record p. 38) and prior to August 3, 1899 it had determined upon the present height and site of its dam and on said date first occupied the Red Bridge site within the meaning of Public Statutes of said Commonwealth, c. 190, § 2, and then began the erection of its dam (Record pp. 39, 75).

There was no determination on the part of the plaintiff to build a dam at the site of its present structure until April 4, 1900 (Record p. 40), and the actual construction of its dam was not begun until August 11,1900 (Record pp. 40, 64).

The dam of the plaintiff including its power house is about three hundred fifty-three feet long and nineteen feet high and the cost of its development was two hundred seventy-one thousand dollars ($271,000); while on the other hand the defendant's dam is eight hundred eighty feet long and fifty feet high and the cost of its development was eight hundred thousand dollars ($800,000).

Owing to the much greater magnitude of the defendant's work, the plaintiff was able to and did complete its dam before the defendant completed its dam, and

the plaintiff by its dam raised and used the waters of the stream before any utilization thereof by the defendant by its dam.

The plaintiff conceded (Record p. 40) that the "Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam."

Notwithstanding the fact that the plaintiff knew on April 4, 1900 before any determination on its part to build a dam that the dam in process of erection by the Ludlow Manufacturing Company would cause its own alleged mill site to be flooded, it did not commence this action until the completion of the defendant's dam.

The plaintiff further contended in the State Court that it was entitled to relief because of the provisions of an unrecorded agreement entered into between it and one Metcalf, who at the time of said agreement was the owner of a parcel of land intermediate between the two dams, purporting to restrict and limit the parties thereto in the erection of dams upon their respective lands. A portion of the land of Metcalf to which this agreement related had since been acquired by the Ludlow Cordage Company, and the claim of the plaintiff was that the title of the Ludlow Cordage Company was colorable, that the land in question really belonged to the Ludlow Manufacturing Company and that that Company was bound by the alleged covenants in said agreement.

It should be observed, however, that the Red Bridge dam was not built upon the land conveyed by Metcalf but on other land acquired by the Ludlow Manufacturing Company in 1891, about two miles down the stream from the Metcalf land with intervening land between, and that said Metcalf was not at the date of

said agreement or at any time the owner of the land upon which said Red Bridge dam stands.

The said Court accordingly held that the Red Bridge dam "was erected under the Mill Act by virtue of the defendant's right as a riparian proprietor at the point where the mill site was established," that "the agreement was either a mere personal contract of Metcalf or it was a contract connected with his land which in equity would follow the land in the possession of a subsequent owner who took it with notice," and "if it follows the land, it has no effect upon the rights of the defendant as the owner of other land below."

The alleged mill site of the plaintiff which is involved in this controversy is referred to herein as its "lower privilege," to distinguish it from other mills of the plaintiff, located at Three Rivers, about three quarters of a mile above upon the same stream, which latter mills are, however, not affected by flowage from the defendant's dam at Red Bridge.

As previously stated, said Red Bridge dam is two miles below the plaintiff's so-called lower privilege.

At Ludlow, four miles still further down said Chicopee River, are located extensive mills of the defendant which it has owned and operated for many years.

In the vicinity of its said mills and in connection with and as a part of its development at Red Bridge the defendant has built and put in operation a new mill; and the erection of said dam at Red Bridge and the development there was for the purpose of generating electrical power, to be transmitted to its said new mill and to its said other mills.

Referring to the Master's report, the following rulings and findings made by him should be noted:

Upon the facts found and agreed and the law in the case *the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropri-*

ation by the Otis Company at its so-called lower privilege (Record p. 76).

Upon the law and the facts found and upon the facts agreed to *the Ludlow Manufacturing Company first occupied its mill site as such* (Record p. 76).

Prior to the time the Otis Company commenced the erection of its dam the mill site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company (Record p. 76).

The mill dam of the Ludlow Manufacturing Company was begun before any occupancy by the Otis Company of its alleged mill site or so-called lower privilege (Record p. 76).

The Ludlow Manufacturing Company within a reasonable time after the commencement of its said occupation completed and put in operation a mill for the working of which the water of the said Chicopee River was applied (Record p. 76).

Such determination as was made by the plaintiff on April 4 to erect a dam *was for the purpose of preventing the appropriation by the defendant Ludlow Manufacturing Company* under its prior determination and did not comprehend the dam subsequently erected by the plaintiff (Record p. 73).

No determination of the plaintiff on April 4 to erect a dam was arrived at until after notice to it of the Ludlow Manufacturing Company's determination to erect a dam which would cause the plaintiff's dam and alleged mill site to be flooded to substantially the extent to which the present dam of the Ludlow Manufacturing Company is capable (Record p. 73).

The date when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of P. S., c. 190, was August 3, 1899 (Record p. 75).

The date when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within

the meaning of said statute after its determination to build a dam high enough to flood the plaintiff's land and injure its lower mill site was August 3, 1899 (Record p. 75).

The first act of occupation of the Red Bridge site by the Ludlow Manufacturing Company within the meaning of said statute after it had determined upon the height of the Red Bridge dam was the excavation of the tail race which began on August 3, 1899 (Record p. 75).

Nothing contained in the so-called Metcalf agreement prohibited the Ludlow Manufacturing Company from erecting and maintaining its present dam and the flowage occasioned thereby (Record p. 75).

September 23, 1904, the plaintiff, the said Otis Company, filed in the Superior Court for the County of Hampden and Commonwealth aforesaid a petition for the recovery of damages under the Mill Act of said Commonwealth (R. L. c. 196, § 4).

This suggestion is not made as the basis for an argument that the plaintiff in error by filing said petition has waived any contention which it is entitled to raise under the record in this case, but merely for the purpose of showing that proceedings for the recovery of compensation in accordance with the Statute of Massachusetts (R. L. c. 196, § 4,) have been begun, and that pending the present controversy the statute of limitations has not run against the plaintiff with respect to such recovery.

Said petition is still pending.

Wherever the word "defendant" is used in this brief the party referred to is the Ludlow Manufacturing Company.

ARGUMENT.

I.

NO FEDERAL QUESTION IS BEFORE THE COURT.

1. The question before the Supreme Judicial Court of Massachusetts was the construction of the statutes of its own State, and it is submitted that no federal question was brought to the attention of the Courts of Massachusetts.

The plaintiff in error brought its bill under the Public Statutes of Massachusetts, c. 190, (now the R. L., c. 196) known as the Mill Act, claiming it was entitled to relief in equity because it completed its dam before the dam of the defendant was completed, and that under sections 1 and 2 of said chapter 190 relief should be given to the proprietor who first completed and put its dam in operation, notwithstanding the defendant first began work upon its dam and proceeded with reasonable despatch in the work of completing it. In other words, the plaintiff claimed that under the Mill Act, the proprietor who first completed its dam was prior in right. On the other hand, the defendant claimed that the proprietor who first began the work of construction was prior in right and entitled to the use of the water.

The real controversy between the parties was upon the construction of sections 1 and 2 of chapter 190 of the Public Statutes. The plaintiff claimed that the statute should be so construed as to give it relief because it finished its dam before the defendant. The defendant claimed that the proper construction of the statute was that the owner who first started was entitled to use its dam although another land owner had previously completed its structure.

The meaning of these two sections of the statute was the real question before the Court, and the Supreme Judicial Court of Massachusetts construed the statute against the construction claimed by the plaintiff and in favor of the construction claimed by the defendant.

The plaintiff in its amended bill (paragraphs 6, 7, 8, 9, Record pp. 25, 26, 27) makes it clear that it sought the construction of the Public Statutes of Massachusetts, (c. 190, §§ 1 and 2) by the Courts of that State. It submitted itself to the jurisdiction of that Court, and in the 9th clause of its bill it says (Record p. 27),

> "If it is the intention and meaning of said statutes hereinbefore recited that a riparian proprietor can, by commencing to occupy his mill site as such or by commencing the work preliminary to the erection of a dam thereon or by commencing to erect such dam, thereby acquire the right to flow out and injure a mill site belonging to an upper riparian proprietor on the same stream and in actual occupation as such, and the water power thereon developed and a water mill thereon completed, in actual use and worked by said water power, then the plaintiff says that said statutes are in violation of the fifth and fourteenth amendments of the Constitution of the United States and of the constitution of Massachusetts.

It is submitted that no federal question was brought to the attention of the Courts of Massachusetts, and the decision of the Courts of that State was purely upon the construction which should be given to its own statutes. In the opinion of the Supreme Judicial Court (Record pp. 113, 114, 115) the Court says as follows:

> "The principal question in the case is, What is the construction of the mill act as applied to these facts? The Pub. Sts. c. 190 § 2, (R. L. c. 196, § 2) is as follows: 'No such dam shall be erected to the injury of a mill lawfully exist-

ing, either above or below it on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill dam be hereafter erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied,' etc.

"The plaintiff contends that the defendant has violated that part of the statute which forbids the erection of a dam to the injury of an existing mill site on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of a mill site which has been occupied by the owner thereof, when the owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied.

"The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the supply of power. The framers of it recognized the fact that such property, in many cases, could not be used profitably by an owner for a short distance along the stream, without affecting the property of other owners above and below, and preventing a like use of the stream for mill sites on other land. An enforcement by riparian proprietors of their rights at common law would often make it impossible for any of them to use water power effectively. Therefore, their personal interests,

as well as the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of this peculiar kind of property. Our mill act is intended to meet this requirement in a way to promote the development of water power from streams for the benefit of individual owners no less than for that of the general public. Lowell vs. Boston, 111 Mass., 454-464. The framers of the statute foresaw the possibility of a desire of two riparian proprietors owning lands near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for power would make it impracticable to maintain a mill in more than one of the two places. It was proper to provide for such cases by statute. Accordingly, we have the provision last above quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the better right. The legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right to use the water, there would have been an inducement to owners to engage in a race to see which could first get the water upon his wheel. In different ways the results of such a rule would have been harmful. The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time. This is substantially the construction which was put upon St. 1795, c. 74, in the case of Bigelow vs. Newell, 10 Pick., 348, although that statute contained no special provision touching this subject. The Rev. Sts. c. 116, § 2, was in different language from the former act, and contained a prohibition

of the erection of a dam to the injury of any mill site on the same stream. Under this statute the case of Baird vs. Wells, 22 Pick., 312, was decided, in which it was held that the Revised Statutes had changed the law, and that the remedy of one who had begun his mill, but had not finished it until after another mill interfering with his had been completed, was by an assessment of damage under the mill act. Thereupon the Legislature passed the St. 1841, c. 18, which is found in almost identical language in that part of the Pub. Sts., c. 190, § 2, on which the present defendant relies. This enactment restored the rule stated in Bigelow vs. Newell, 10 Pick., 348, which was held to have been changed by the Rev. Sts., c. 116, § 2. Storm vs. Manchaug Company, 13 Allen, 10, 15. That this is the true construction of this statute is further indicated by language used in other cases. *Dean* vs. *Colt*, 99 Mass., 486, 487. *Fitch* vs. *Stevens*, 4 Met., 426, 428. See also Washburn on Easements, 4th Ed., 336, 337. For general discussion of the law, see *Fuller* vs. *Chicopee Manuf. Co.*, 16 Gray, 43. *Fiske* vs. *Framingham Manuf. Co.*, 12 Pick, 68. *Fitch* vs. *Stevens*, 4 Met., 426. *Cary* vs. *Daniels*, 8 Met., 466. *Gould* vs. *Boston Duck Co.*, 13 Gray, 442. *Smith* vs. *Agawam Canal Co.*, 2 Allen, 355, 356.

It is therefore submitted that the question involved in the case was not the validity of the Mill Act, but merely the construction of certain sections of the Act.

> "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of un-

constitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Comm. Bank of Cincinnati vs. Buckingham, 5 How., 317, 343.

When the parties have been heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States.

Walker vs. Sauvinet, 92 U. S., 90.

"The appellate jurisdiction of this Court, upon writ of error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the State Court to be valid, and not when an act admitted to be valid has been misconstrued by the Court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the State Court was one of construction only, and not of validity. If this Court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest Court of the State has erred in its construction of the statute."

Central Land Co. vs. Laidley, 159 U. S., 103.

"We are not authorized by the Judiciary Act to review the judgments of the State Courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State Court

could be brought here, when the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held."

Knox vs. Exchange Bank, 12 Wall., 379, 383.

The 14th Amendment of the Constitution of the United States is violated, if violated at all, because the Massachusetts statute takes from the plaintiff its property without due process of law. The action of the Court in construing a certain section of the statute did not in any manner raise the question of the validity of the statute or of its constitutionality, but merely decided the meaning of the statute, holding that as between adjoining proprietors of land on the same stream, the one who began first with the erection of his dam was first in right.

To decide that a Federal question was involved in such a proceeding and that the plaintiff was entitled to a rehearing in the Supreme Court of the United States would be to say that a plaintiff could go into a State Court, submitting to that Court's jurisdiction and asking the Court to say that a certain statute meant one thing, and that if it didn't mean the thing contended for by him, then the section so construed was a violation of the 14th Amendment. This, it is submitted, cannot be done, for such a proceeding would oust the State Courts of jurisdiction at the demand of the very party who invoked that jurisdiction.

"The plaintiff below had the benefit of a full and fair trial in the several Courts of her own State, whose jurisdiction was invoked by herself. In those Courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

Marchant vs. Penn. R. R. Co., 153 U. S., 380, 386.

A stream of water would be useless for manufacturing purposes, unless there is some law regulating the

use of the water between the various riparian owners. These regulations are State questions, and if the statute under which the rights of the water owners are governed provides a tribunal for the hearing of all questions involved, and provides for the assessment of damages, then there is due process of law as required by the 14th Amendment of the Constitution of the United States. And the regulation of the respective rights of the mill owners under that statute is a local question.

Castillo vs. McConnico, 168 U. S., 674 and cases cited.

2. The validity of the Statute as a whole was not questioned by the plaintiff.

The plaintiff did not contend that the Mill Act was unconstitutional. On the contrary it practically admitted its validity. It sought relief under the Act, it came before the Courts of Massachusetts basing its right to relief upon this Act, and in effect saying that the Act is perfectly valid in all respects, including sections 1 and 2, but if the construction of these sections claimed by the defendant is the correct construction, then these sections, *not the whole statute*, are contrary to the 14th Amendment.

It is submitted that a party plaintiff cannot in this way and manner properly present a Federal question for the determination of the Court. The question raised by such pleading, and the only question thus raised, is the question of the proper construction of a State statute.

If it be assumed that a State statute may be so construed as to deprive one of his property without due process of law, because the State Court decides that under the statute no notice of the taking of his land is necessary, or because it does not give ample damages for the land so taken, and if it be assumed still further that by proper pleadings and procedure the Federal

question is properly brought to the attention of the Court, then the answer to this contention is that no such question was presented to the Courts of Massachusetts, nor was such a question necessary for the decision of the Court in this case.

The question of adequate provisions for damages and notice were questions involved in the Mill Act as a whole, and were not involved merely in sections 1 and 2 of this Act. The whole Act was not before the Court, nor was its construction of the Act as a complete statute asked for by the plaintiff. The statute as a whole deals with the question of damages, and in sections other than the ones above referred to, makes full and adequate provision for their payment. None of these questions were involved in sections 1 and 2. Much less can it be said that these questions, or any constitutional questions, were involved in the construction of these particular sections.

The Court in deciding that as between two riparian proprietors on the same stream, both relying upon the same statute, the proprietor who first begins the work of constructing his dam is first in right, does not in so deciding pass upon any question of damages or notice or any question of due process of law which may arise under the 14th Amendment.

The Court thereby merely decides upon a matter entirely within its jurisdiction, that is, it decides what the statute means, it construes its own laws, and passes on the question, who is entitled to the beneficial use of the waters of the stream, the one who in good faith first starts upon the work of building his dam, or the one who for any reason first completes his work. And it no more raises a constitutional question in deciding in the way it did, than if it decided differently and decided that the proprietor who first completes his dam is prior in right. Could it be claimed that under such a construction, a construction favorable to the plaintiff, the defendant could raise a constitutional question and could come before this Court on a writ of error on

the ground that the decision of the Supreme Judicial Court of Massachusetts violated the 14th Amendment? If the State Court decided in accordance with the plaintiff's contention the plaintiff would not ask for relief from the Federal Court, it would have been content with the statute as construed by the Courts of the State. Can the plaintiff come before this Court because the construction placed upon certain sections of the statute is contrary to its contention?

3. Even if a federal question is involved, the plaintiff has waived it.

By submitting to the jurisdiction of the State Court and seeking a remedy under the Mill Act, the plaintiff deprived itself of the right to question the constitutionality of the statute.

The plaintiff elected to proceed under the statute and by so doing waived its right to contest the constitutionality of the law whose aid it invoked. By proceeding under the particular statute it acquiesced in its validity.

Hale vs. Lewis, 181 U. S., 473.
Electric Co. vs. Dow, 166 U. S., 489.
Eustis vs. Bolles, 150 U. S., 361.
Pitkin vs. Springfield, 112 Mass., 509.
Baker vs. Braman, 6 Hill, 47.
Dewhurst vs. Allegheny, 95 Pa. St., 437.

A party who seeks in the State Court to litigate rights and is given an opportunity to do so, cannot raise a Federal question simply because he is unsuccessful.

Remington Paper Co. vs Watson, 173 U. S., 443.
Cooley on Const. Lim., 6th Ed., p. 214.
Bigelow on Estoppel, p. 689.

The plaintiff by its pleadings took two inconsistent positions before the Courts of Massachusetts, one that the Courts of that State should take jurisdiction

over the action for the purpose of construing certain sections of the statute, and the other that the State Courts were without jurisdiction under the statute, unless they construed these sections in a certain way. And the plaintiff thereby is precluded from raising the question of the violation of the Federal Constitution.

Amy vs. Manning, 144 Mass., 153.

Washburn vs. Gt. West. Ins. Co., 114 Mass., 175.

A plaintiff in a bill in equity cannot rest his claim to relief on inconsistent titles. He cannot at the same time claim relief upon the assumption that a certain law is both valid and invalid. The position of the plaintiff in this case is analogous to the position of a plaintiff who in the same bill in equity asserts a will to be valid in order to claim a benefit thereunder, or invalid in order that he may be also benefited.

Wright vs. Wilkin, 4 D. G. & J., 141.

4. Plaintiff not entitled to relief because of its laches.

The Ludlow Manufacturing Company began the work of building its dam on August 3, 1899 (Record p. 75). The plaintiff brought this bill in equity in October, 1901. For a year and more before the present suit was begun the plaintiff had actual and constructive notice of the work the defendant was engaged in, and made no move to prohibit it, but suffered it to proceed with the work and expend large sums of money thereon (Record pp. 63, 64, 65, 66).

The plaintiff was therefore guilty of laches, and upon this ground the State Courts might have decided adversely to the plaintiff.

> "It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in

> good faith. In such cases a prompt assertion of right is essential to a just claim for relief in equity."
>
> Whitney vs. Union R. Co., 11 Gray, 359, 367.

5. Even if a federal question is involved, it is not properly presented.

Nor was the constitutionality of the Mill Act properly presented to the Courts of Massachusetts. The only suggestions of a conflict between the statute of Massachusetts and the Federal Constitution were contained in the plaintiff's bill, and not only did the plaintiff by its own pleadings place itself in an inconsistent attitude before the State Courts, but its allegations bearing upon this question are argumentative and in the alternative. The pleadings, therefore, did not properly raise any Federal question.

Looking at paragraphs 6, 7, 8 and 9 of the plaintiff's last amended bill (Record pp. 25, 26, 27) it is seen that the plaintiff is arguing against an assumed construction of a portion of the statute and is stating its case in the alternative. And the defendant did not waive this defect; it specifically demurred to this portion of the plaintiff's bill. (See answers of the defendant, Record pp. 28, 29, 30, 31.)

The Supreme Judicial Court might well have placed its decision upon the fact that the demurrer of the defendant should be sustained, and it is submitted that the question of the defect in the plaintiff's pleadings is still open to the defendant.

6. The decision of the Supreme Judicial Court of Massachusetts was not based on any federal question.

It is not sufficient to give this Court jurisdiction that a Federal question may possibly arise. The Federal question must be clearly and certainly involved.

The Federal question must have been decided and it must have been necessary for the decision.

It must appear that the decision of the State Court necessarily rests on the Federal question, for if the decision was also rendered upon some other ground broad enough to support the decision of the State Court, the Supreme Court will not take jurisdiction.

And if in the opinion of the Supreme Court the State Court could have rendered judgment upon grounds not involving a Federal question, then the Supreme Court will not take jurisdiction.

Klinger vs. Missouri, 13 Wall., 257.
Jenkins vs. Loewenthal, 110 U. S., 222.
Chouteau vs. Gibson, 111 U. S., 200.
DeSaussure vs. Gaillard, 127 U. S., 216.
Hammond vs. Johnston, 142 U. S., 73.

The Federal question was not necessary for the decision of this case, and the decision can be maintained upon grounds involving no Federal question. The plaintiff claimed the right to maintain its bill on two grounds. One of these was the so-called Metcalf agreement. (This was an agreement between the plaintiff and one Metcalf, restricting the rights of the parties to that contract upon a certain portion of the Chicopee River. None of the defendants were parties to that contract, however, and it did not purport to impose any restrictions upon the use of that part of the Chicopee River upon which the defendant built its dam.) On this part of the case the Supreme Judicial Court of Massachusetts decided that the rights of the defendants were not affected by the Metcalf agreement. There was clearly no Federal question involved in this part of the decision. The only other ground upon which the plaintiff claimed the right to maintain its bill was that the Mill Act should be construed in a certain way, giving it a right because of prior completion, but on this question the decision of the Court was that the construction claimed by the plaintiff was not correct. Up to this point no Federal question was

involved, and none was necessary for the decision of the case; and the case was decided upon these two points. These points fully settled the rights of the parties upon the stream, and no Federal question was raised by the plaintiff's suggestion that a construction contrary to that claimed by it, would be unconstitutional.

Giles vs. Teasley, 193 U. S., 146.
Pierce vs. Somerset Ry., 171 U. S., 641.
O'Neil vs. Vermont, 144 U. S., 323.
Rutland R. R. vs. Cent. Vt. R. R. Co., 159 U. S., 630.
Beaupre vs. Noyes, 138 U. S., 397.
Hale vs. Lewis, 181 U. S., 473.
Tennessee vs. U. & P. Bank, 152 U. S., 454.
Johnson vs. Risk, 137 U. S., 300.
Klinger vs. Missouri, 13 Wall., 257.

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. It is likewise settled law, that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

Eustis vs. Bolles, 150 U. S., 361.

See also

Cook County vs. Calumet etc. Dock Co., 138 U. S., 635.

Sawyer vs. Concordia, 12 Fed., Rep., 754.

Pac. Gas Imp. Co. vs. Ellert, 64 Fed. Rep., 421.

"It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant * * *."

McKenna, J., in Harrison vs. Morton, 171 U. S., 38.

And jurisdiction is not conferred upon the Federal Courts by a statement that plaintiff intends to rely upon a statute of the State and that the statute construed in a certain way violates the Federal Constitution.

Boston Mining Co. vs. Montana Ore Co., 188 U. S., 632, 639.

Tennessee vs. U. & P. Bank, 152 U. S., 454.

Arkansas vs. K. & T. Coal Co., 183 U. S., 185.

Mut. Life Ins. Co. vs. McGrew, 188 U. S., 291, 310.

And if we assume that the Supreme Judicial Court of Massachusetts passed upon the Federal question and decided it adversely to the plaintiff, this does not change the rule, if the Federal question was unnecessary for the decision.

Harrison vs. Morton, 171 U. S., 38.

Eustis vs. Bolles, 150 U. S., 361.

N. P. R. R. Co. vs. Ellis, 144 U. S., 458.

Rector vs. Ashley, 6 Wall., 142.

Wood M. & R. M. Co. vs. Skinner, 139 U. S. 293.

Kennebec R. R. vs. Portland R. R., 14 Wall., 23.

Cal. Powder Works vs. Davis, 151 U. S., 389.
Gibson vs. Chouteau, 8 Wall., 314.
Miss. Pac. Ry. vs. Fitzgerald, 160 U. S., 556.
Seneca Nation vs. Christy, 162 U. S., 283.

But it is further submitted that the Court did not pass upon any Federal question. The only question of this kind which the Court even mentioned was the question of damages, and this question did not arise in the present case, and the Court so stated in its opinion. "It is unnecessary to determine, in this case, what constitutional rights one has in the question of damages." (See Opinion, Record p. 116.)

The Court was here considering the question of the supposed conflict of the statute with the Massachusetts Constitution, and made no reference to any conflict between the statute and the Constitution of the United States.

See Miller vs. Cornwall R. R. Co., 168 U. S., 131.
Kipley vs. Illinois, 170 U. S., 182.

And on this question as before stated the plaintiff has already commenced in the Superior Court for Hampden County, in the Commonwealth of Massachusetts, under the identical statute which is now claimed to be unconstitutional, proceedings to recover damages as provided in said statute.

The petition of the plaintiff to recover damages for the injury done to its property by the defendant is brought under § 4 of chapter 196 of the Revised Laws of Massachusetts, and that section provides that the owner of land flowed or otherwise injured by a dam erected under the statute, may obtain compensation therefor. And in this proceeding the question of the amount of the plaintiff's damages will be before the Court for decision, and the question of its damages does not arise in the case now before the Court.

It is therefore submitted that the Court did not decide this case on any Federal question; that the rights of the parties were settled without reference to any

such question, and the decision of the Court can be supported upon the two grounds, namely, the effect of the Metcalf agreement, and the rights of riparian owners under §§ 1 and 2 of the statute.

7. The plaintiff raised merely a moot question.

The Supreme Court of the United States will not assume jurisdiction of this case if the plaintiff raises only a moot question. The plaintiff asks for a decision upon the constitutionality of a certain statute, upon which statute it relies for relief, and a decision in the plaintiff's favor will not be decisive of the rights of the parties or confer any benefit upon the plaintiff.

The plaintiff seeks the protection of the Courts under the Mill Act of Massachusetts, which Act, it says, as construed by the Courts of Massachusetts, is unconstitutional. If the Mill Act is unconstitutional, it is so because the State Courts have construed it in a certain way, and no other construction can be placed upon the statute except the construction given to it by the Courts of its State. If the plaintiff is correct in its contention, then the Mill Act is unconstitutional, and it follows that from this decision it is entitled to, and can receive, no benefit in this suit. For if the statute is invalid, because contrary to the Federal Constitution, the plaintiff no more than the defendant is entitled to any relief under it; it is as void for one party as the other. It is an unconstitutional law under which neither party can establish a right, and nothing but an abstract proposition therefore is before this Court for decision. The plaintiff stands no better than the defendant if the statute is void, and no relief can be given to it if it obtains a favorable decision.

Castillo vs. McConnico, 168 U. S., 674.
Kimball vs. Kimball, 174 U. S., 158.

If the plaintiff rests its claim upon anything contained in the pleadings apart from the statute, which statute it claims to be contrary to the 14th Amendment

of the Constitution, then the question may be asked upon what claim does it rest its right to recover. Upon the allegations in the bill relating to the Metcalf agreement? If upon this ground, the answer is, the question involved therein was whether this so-called Metcalf agreement ran with the land or was a purely personal agreement. And the State Court has said it was a personal and not a real covenant. This was entirely a local and not a Federal question, and upon this question the rights of the parties are permanently settled by the decision of the State Court. This is really the only common law question raised by the pleadings. No other question, apart from the question under the statute, was involved in the proceedings.

But if it can be said that another common law question was before the Court for decision and properly raised by the pleadings, that question, considered in the light most favorable to the plaintiff, was a question of the reasonable use of the stream.

This question, if it arises at all, comes up under the fifth paragraph of the plaintiff's bill, which paragraph is based solely upon the Metcalf agreement; and this agreement, we have seen, was construed against the contention of the plaintiff.

But if it may be thought that the plaintiff fairly presented to the State Court the question of the reasonable use of the stream as between itself and the defendant, aside from the Metcalf agreement, then the decision of the State Court would be conclusive and controlling upon plaintiff and defendant as a common law question, a matter upon which this Court would not take jurisdiction.

In other words, if the plaintiff succeeds in its contention, it is entitled to no relief either in this Court or in the Courts of Massachusetts. And therefore, it is submitted, for the reasons given above, the plaintiff presents no Federal question for the decision of the Supreme Court, and its writ of error should be dismissed.

II.

THE CONSTITUTIONAL QUESTION.

The Mill Acts of Massachusetts, Public Statutes, chapter 190 (Revised Laws, chapter 196), are in accord with the Constitution of that Commonwealth.

In most of the cases in that jurisdiction, the validity of the Mill Acts has been assumed by the highest court of the State for more than one hundred years without dispute.

Manufacturing Co. vs. Upham, 5 Pick., 292.
Bigelow et al. vs. Newell, 10 Pick., 348.
Palmer Co. vs. Ferrill, 17 Pick., 58, 65.
Baird vs. Wells, 22 Pick., 312.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Fiske vs. Framingham Mfg. Co., 12 Pick., 68.
Fitch vs. Stevens, 4 Met., 426.
Brigham vs. Wheeler, 12 Allen, 89.
Lowell vs. Boston, 111 Mass., 454, 466, 467.
Washburn's Easements, (4th Ed.) 336, 337.
Cary vs. Daniels, 8 Met., 466.
Gould vs. Boston Duck Co., 13 Gray, 442.

There are also many other decisions of the same Court that might be cited in this connection.

In cases where the question has been directly raised, the validity of the statutes known as the "Mill Acts" has been by the same court sustained and they have been declared constitutional.

Murdock vs. Stickney, 8 Cush., 113.
Hazen vs. Essex Company, 12 Cush., 475.
Lowell vs. Boston, 111 Mass., 454.
Turner vs. Nye, 154 Mass., 579.
Otis Company vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 95.

This being the construction of these statutes by the highest court of the State, such construction is conclu-

sive on the Federal Supreme Court on a writ of error to the State Court.

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Noble vs. Mitchell, 164 U. S., 367.
Carstairs vs. Cochran, 193 U. S., 11.
Walker vs. Sauvinet, 92 U. S., 90.
Merchants' & Mfrs. Natl. Bank vs. Pennsylvania, 167 U. S., 461.
Rasmussen vs. Idaho, 181 U. S., 198, 200.
Morley vs. Lake Shore & Michigan Southern R. R., 146 U. S., 162.

In Fallbrook Irrigation District vs. Bradley, *supra*, Mr. Justice Peckham in the course of his opinion takes occasion to say:

> "We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the *act* violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it do not, then there is no justification for the Federal Courts to run counter to the decisions of the highest state court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."
>
> Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 155.

In Morley vs. Lake Shore & M. S. R. R., 146 U. S., 162, Mr. Justice Shiras delivered the opinion in which he quotes the language of Mr. Justice Field in the opinion delivered by him in the case of Louisiana vs. Pilsbury, 105 U. S., 278, 294.

"'Whether such a construction (by judicial decisions upon a clause of a state constitution) was a sound one, is not an open question * *. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. * * * * * 'The rule of construction adopted by the highest court of the State, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' * * * * * The meaning of a state statute declared by the highest court of a State, is conclusive upon this court. Randall vs. Brigham, 74 U. S., (7 Wall.) 523, 541. If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the law of the state, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the state was unobjectionable, yet the state court had erroneously construed it."

Morley vs. Lake Shore & M. S. R. R., 146 U. S., 162.

A.

The Mill Act of Massachusetts, Public Statutes, chapter 190 (Revised Laws, chapter 196), is not in violation of the 14th Amendment of the Constitution of the United States.

The plaintiff assigns twenty-one errors, which resolve themselves into and present for decision but a single question. That question is whether it has been

deprived of its property without due process of law contrary to the provision of this 14th Amendment.

In a majority of the states of the Union, Mill Acts exist, similar in their nature and provisions to the one now under consideration. Many of them have been in force for a long series of years. Several of them were fashioned after the Massachusetts Mill Act.

In most of those states their validity has either been unquestioned or has been determined in the affirmative. In the two or three instances where they have been adjudged invalid, such adjudication has been upon the ground of incompatibility with the constitution of the particular state.

Annexed to the opinion in Head vs. Amoskeag Mfg. Co., 113 U. S., 9, is a list of states in which Mill Acts were in force up to the year 1884.

Moreover, in many of the western states there are Aqueduct, Irrigation and Ditching statutes of like nature and enacted for analogous purposes and receiving similar construction which have been upheld by not only the highest courts of the respective states but also by this Court.

The Mill Acts of Massachusetts with little change in phraseology have been in existence since the Provincial Laws, 12 Anne, c. 8. *Acts and Resolves of the Province of Massachusetts Bay, Vol. 1, p. 729.*

B.

History of the So-Called Mill Acts.

It may not be amiss to call attention to the material provisions of the Mill Acts of Massachusetts up to and including Public Statutes, chapter 190, which latter constituted a portion of the law of the Commonwealth when the plaintiff in error instituted its bill in equity against these defendants.

The Provincial Laws, 12 Anne, c. 8, provided that:

"Whereas it hath been found by experience that, when some persons in this province have been at great cost and expence, for building of mills serviceable for the *publick good*, and benefit of the town, or considerable neighbourhood, in or near to which they have been erected, that, in raising a suitable head of water for that service, it hath sometimes so hapned that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and lawsuits have arisen; for prevention whereof for the future,—

"Be it therefore enacted by His Excellency the Governour, Council and Representatives in General Court assembled, and by the authority of the same,

"Sec. 1. That where any person or persons have already, or shall hereafter, set up any water mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands, legally obtained, whereupon such mill or mills is or shall be erected or built, that then such owner or owners shall have free liberty to continue and improve such pond, for their best advantage, without molestation.

"Sec. 2. And if any person or persons find themselves agrieved and damnified in their propriety of lands, by its being flowed by the owner or occupant of such mill(s) stopping or raising the water, that, in every such case, the party so damnified in his propriety, (*upon*) (making) application for relief to the court of general sessions of the peace in the county where such mills or pond is, the said court be and hereby are impowered to issue out a warrant, directed to the sheriff of the same county, to summon and impannel a jury of good and law-

ful men, at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of (*the*) peace, to a faithful, indifferent apprisal of the yearly damage done to (*the*) (any) person complainant, by flowing his or their land as aforesaid."

Acts and Resolves of the Province of Massachusetts Bay, Vol. 1, p. 729.

The Act of 1795, chapter 74, so far as material, is as follows:

"Whereas the erection and support of mills to accommodate the inhabitants of the several parts of the state ought not to be discouraged by many doubts and disputes; and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors—therefore

"Sec. 1. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, that where any person hath already erected, or shall erect any water mill on his own land, or on the land of any other person by his consent legally obtained, and to the working of such mill, it shall be found necessary to raise a suitable head of water, and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage in the manner and on the terms hereinafter mentioned.

"Sec. 2. And be it further enacted, that if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said Court shall issue a warrant to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the

same county not interested, such sheriff or coroner to be named by the Court, directing him to summon and empannel a jury of twelve good and lawful men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the cause; and their verdict being returned by the officer to the same court and there allowed and recorded shall be a sufficient bar to any action to be brought for any such damages. And it shall be in the power of said court to assess such sum to the officer for his services as they may judge reasonable."

The Act of 1824, chapter 153, first made the owner of a dam erected under the Mill Acts liable for flowing lands *below* his dam and for the retention of water above it.

In 1836 the Revised Statutes were enacted, the material parts of which are the following sections of chapter 116:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sec. 2. No such dam shall be erected, to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment, or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary

by the common law, if no provision relating to mills had been made by statute."

The Act of 1841, chapter 18, provides as follows.

"Sec. 1. No mill dam shall hereafter be erected or raised to the injury of any mill site on the same stream, which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing such occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied.

"Sec. 2. So much of the second section of the one hundred and sixteenth chapter of the Revised Statutes as is inconsistent with the provisions of this act, is hereby repealed."

General Statutes, chapter 149, contains the laws upon this subject in force in 1860. The sections of the chapter material to this controversy are as follows:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sec. 2. No such dam shall be erected to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill-site on the same stream, on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall any mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof: *provided*, that such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream shall be

applied; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority, from the owner, as would be necessary by the common law if no provision relating to mills had been made by statute."

The material provisions of Public Statutes, chapter 190, are as follows:

"Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

"Sec. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

"Sec. 3. The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury.

"Sec. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint be-

fore the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

"Sec. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

"Sec. 6. The complaint may be filed in the court in term time, or in the clerk's office in vacation, and in either case notice thereof shall be given to the owner or occupant of the mill by delivering to him, or leaving at his dwelling-house, an attested copy of the complaint; or if he is not found within the commonwealth, and has no dwelling-house therein, by leaving such copy at the mill in question fourteen days at least before the complaint is to be heard; or the complainant may, fourteen days at least before the sitting of the court to which his complaint is brought, cause the owner or occupant of such mill or dam to be served with an attested copy of the complaint by delivering or leaving such copy in like manner as when the complaint is filed as aforesaid.

"Sec. 7. The notice shall be served by an officer authorized to serve other civil processes between the same parties.

"Sec. 8. The respondent may answer in bar that the complainant has no estate or interest in the land alleged to be flowed or injured, that the respondent has a right to maintain his dam for an agreed price or without any compensation, or any other matter which may show that the complainant cannot maintain the suit; but

the respondent shall not answer that the land described is not injured by the dam.

"Sec. 9. If a plea or answer is filed by the respondent, the replication and other pleadings, and the trial of the issue, whether of law or of fact, shall be conducted in like manner as in actions at common law.

* * * * * *

"Sec. 11. If the owner or occupant of the mill or dam, after due notice, is defaulted or offers no legal objection, or if an issue is decided in favor of the complainant, the court shall issue a warrant for a jury to hear and determine the matter of the complaint.

"Sec. 12. Such warrant shall be directed and served, and the jurors shall be drawn, summoned, and returned, in the manner provided in chapter forty-nine with respect to a jury returned on the complaint of a person aggrieved by the laying out of a highway, and the jurors shall be required to attend under a like penalty, and the proceedings for supplying a deficiency of jurors and all other proceedings in the case shall be substantially the same as are provided in said chapter.

"Sec. 13. If the parties so agree by writing filed in the case, the trial may be had before a jury in the superior court as in other civil actions, and in such case, if either party requires it, the jury shall view the premises alleged to be injured, subject to such regulations and terms as the court may prescribe.

"Sec. 14. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned by the dam to his other land, as well as the damage occasioned thereby to the land overflowed; and they shall also allow by way of set-off any bene-

fit occasioned by such dam to the complainant in relation to his lands.

* * * * * *

"Sec. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

"Sec. 17. If it is alleged in the complaint that the dam is raised to an unreasonable height, or that it ought not to be kept up and closed during the whole year, the jury shall decide how much, if any, the dam shall be lowered, and also whether it shall be left open during any part of the year, and, if so, during what part, and shall state such decision as a part of their verdict.

"Sec. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

"Sec. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three

months cause the same to be entered on the record of the case in the clerk's office.

"Sec. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

"Sec. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner or occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

"Sec. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

"Sec. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last passed, whoever has owned or occupied the mill during that time; and he shall be entitled to full cost, although the sum recovered does not amount to twenty dollars.

"Sec. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

* * * * * *

"Sec. 26. The court to which a verdict upon a complaint for flowing land is returned may set it aside for any sufficient cause, and may grant a new trial to be had upon a new warrant or otherwise as the case may require.

"Sec. 27. The party prevailing upon such a complaint shall be entitled to his full costs, except where it is otherwise expressly provided. The court shall award a reasonable compensation to the person who presides at the trial, when it is had before a sheriff's jury, and to the officer who executes the warrant, and the amount so awarded shall, with the pay of the jurors and other like charges, be advanced by the complainant, and taxed and allowed in the bill of costs.

"Sec. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter.

"Sec. 29. The provisions of this chapter shall not, except as is herein expressly provided, affect the right to keep up, maintain, and use any water-mill and mill-dam now lawfully existing; but when the owner or occupant of a mill or dam

makes any material change by raising the dam or by altering the machinery or the manner of using the water, so as to cause additional damage to the land of another, it shall be considered as a new mill or dam, in respect to such additional damage, and the remedy and proceedings to recover compensation therefor shall be substantially such as are provided in this chapter respecting a new dam.

"Sec. 30. When either party is dissatisfied with the annual compensation established by a jury, either under the provisions of this chapter or under the laws heretofore in force, a new complaint may be brought for the increase or diminution of such compensation, or for ascertaining the gross amount of the damages, and all the proceedings shall be conducted substantially in the manner before provided in the case of an original complaint; but when a complainant has declined to accept gross damages which have been awarded to him, no jury shall again determine the amount of gross damages until the expiration of ten years thereafter.

"Sec. 31. Such new complaint may be maintained by and against either of the parties to the original suit, or by and against a person lawfully holding under either of them, but no such complaint shall be brought until the expiration of one month after the payment of the then last year has fallen due.

* * * * * *

"Sec. 36. If upon a complaint by the owner of the land the jury decide that he is not entitled to any annual compensation, the judgment thereon shall be no bar to a new complaint for damages alleged to have arisen after the former verdict and for compensation for damages thereafter sustained.

* * * * * *

"Sec. 39. Two or more persons suffering damage from a mill-dam, whether jointly or separately interested in the lands injured, may join in a complaint under this chapter; and their cases may be heard before the same jury, which may assess joint or several damages as the interest and title of the complainants may require; and judgment and execution for damages and costs shall be had in conformity thereto.

* * * * * *

"Sec. 41. If a complaint is abated or otherwise defeated for any matter of form, or if after verdict for the complainant the judgment is reversed for error, upon a certiorari or otherwise, the complainant, or any person claiming from, by, or under him, may bring a new complaint for the same cause at any time within one year after the abatement or other determination of the original complaint or after the reversal of the judgment, and may upon the new complaint recover all damages sustained during the three years before or at any time after the institution of the first complaint.

* * * * * *

"Sec. 52. No reservoir, reservoir-dam, or mill-dam shall be constructed or materially altered, until plans and specifications of the proposed work have been filed with and approved by the county commissioners of the county where it is to be done. Said commissioners shall retain and record such plans and specifications, and shall inspect the work during its progress; and if at any time it appears that the plans and specifications are not faithfully adhered to, they may appoint an inspector, to be constantly engaged at the expense of the owners in the supervision of the work; and upon a refusal of the owners or of their agents to adhere to said plans

and specifications, said inspector may order the discontinuance of the work; *provided*, however, that nothing contained in this and the six following sections shall apply to small dams, constructed for irrigation or for other purposes, the breaking of which would involve no risk to life or property."

(In paragraph 8 of plaintiff's Amended Bill of Complaint (Record p. 26), an attempt was made to recite sections one and two of the Statute, but such recitation is omissive and incorrect.)

C.

Reason for and object of the "Mill Acts."

They were enacted to induce and enhance the wealth and prosperity of the Commonwealth, for the public welfare, for the resulting general good, for the promotion of and increase of industries and manufactures, for the development of the resources of the State, and incidentally for the discouragement of controversies between riparian proprietors and for the regulation of the rights of property owners upon streams adaptable for power purposes, in a manner best calculated on the whole to promote and secure their common rights in it.

It is by virtue of this legislation that Massachusetts has attained her success and ascendency in the industrial world. It is also true that similar statutes in the other New England States were and are the proximate causes of their advancement and thrift.

Under chapter 74 of the Acts of 1795, Mass. Statutes, there arose the case of *Bigelow et al. vs. Newell* (1830) reported in the 10th of Pickering, 348, in which the Court held, in an opinion by Shaw, C. J.:

> * * * "that when the upper proprietor has actually built or is building a mill thereon, [*i. e. on the same stream*] a lower proprietor cannot,

> without a right acquired by grant, prescription or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege."
>
> Bigelow et al. vs. Newell, 10 Pick., 348, 356.

Subsequently the Revised Statutes were enacted, under which the case of *Baird vs. Wells*, 22 Pick., 312, was decided, wherein it was held that a certain change in the phraseology of the Revised Statutes had changed the law. In this case the plaintiff began the construction of his dam in December, 1836, the defendants in March, 1837. The defendants finished their dam in April, 1837, and the plaintiff, who was the upper proprietor, was prevented from further construction of his dam by the water set back by the dam of the defendants, who were the lower proprietors. Wilde, J., in delivering the opinion of the Court said:

> "The question is, whether the present case is brought within this prohibitory clause of the statute. And it is the opinion of the Court that it is not. At the time defendants' dam was erected the plaintiff had no existing mill. The defendants' dam was erected in April, 1837; and the plaintiff's mill was not completed until the December after. The plaintiff's race-way from the brook to his mill for the purpose of procuring a head of water, was not begun until September or October, of the same year. Nor was the plaintiff's mill site one on which a mill or mill-dam had ever before been erected and used. So that the case is not within the true meaning and indeed the express words of the statute. If the plaintiff has any remedy, it is under the Mill Acts, as the jury were instructed. The case of *Bigelow vs. Newell*, 10 Pick., 348, was cited in support of the plaintiff's claim; but as that case was decided before the Revised Statutes, it cannot control the obvious meaning of the second section of the statute."
>
> Baird vs. Wells, 22 Pick., 312, 315.

By this interpretation of the statute, adopted by the Court in Baird vs. Wells, the very objects sought to be attained by Chapter 74 of the Acts of 1795, were defeated. The legislature, therefore, promptly passed Chapter 18 of the Acts of 1841, which restored the rule of law determined in the case of *Bigelow et al. vs. Newell, supra.*

The Court set forth these changes in the statutes, and the final restoration of the earlier rule, in *Storm vs. Manchaug Company et al.*, 13 Allen, 10, as follows:

> "Before the Revised Statutes, if an upper proprietor was building a mill, he was held to have so far appropriated the water privilege that a lower proprietor could not erect a new dam, or raise an old one, to his injury. *Bigelow vs. Newell*, 10 Pick., 348. By a slight and perhaps unintentional change of phraseology introduced into those statutes, it was held that the law was changed; and that nothing but an existing mill could prevent the lower proprietor from putting a mill-dam upon his own land, although the effect of it might be to destroy an upper privilege which its owner had previously begun to occupy. *Baird vs. Wells*, 22 Pick., 312. This was altered, and the old rule restored, by St. 1841, c. 18."
>
> Storm vs. Manchaug Company et al., 13 Allen, 10, 15.

The Act of 1841, c. 18, we find, then, to have been enacted for the purpose of restoring the law as it existed before the Revised Statutes, which, as construed by the Court, had reversed the theretofore established rule, and enacted that nothing but the actual completion of a dam by the owner of one mill site should avail to abridge the rights of the owner or proprietor of another mill site.

The legislature insisted upon returning to the old rule, and did so, unquestionably, because convinced that in practice it was the only workable rule; that a

race between owners of mill sites for the completion of their respective dams would not conduce to the safety of those structures, while it surely would tend to much controversy and litigation; and that the construction of mills and dams would not be encouraged by a policy under which the builder of a dam might find his entire expenditure wasted because another owner of a mill site had managed to complete his dam first.

This purpose of legislation is made doubly plain by the enlargements contained in *General Statutes, Chapter 149, Section 2, and in Public Statutes, Chapter 190, Section 2.*

That the object, purpose and effect of the Mill Acts as they existed at the inception of this controversy are such as herein suggested, see also the following cases:

Fiske vs. Framingham Mfg. Co., 12 Pick., 68.
Fitch vs. Stevens, 4 Met., 426.
Brigham vs. Wheeler, 12 Allen, 89.
Fuller vs. Chicopee Mfg. Co., 16 Gray, 43.
Lowell vs. Boston, 111 Mass., 454, 466, 467.
And the cases therein cited.

D.

The enactment by the Legislature of Massachusetts of Public Statutes, chapter 190, was a legitimate exercise of its authority within the scope of its power to provide for the welfare and prosperity of the people of the State.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9-26.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Wurts vs. Hoagland, 114 U. S., 606.
Barbier vs. Connolly, 113 U. S., 27.
Manigault vs. Springs, U. S. dec. 4, 1905

The defendant contends that the above cases decide that this "Mill Act" now under consideration does not contravene the provisions of the 14th Amendment of

the Constitution of the United States, and that in effect they determine that this "Mill Act" (Public Statutes, chapter 190) is consonant with said amendment.

The defendant claims that Head vs. Amoskeag Mfg. Co., *supra*, in terms decides that this Massachusetts statute is in accord with the 14th Amendment. The references repeatedly made in the opinion in the above case to the Massachusetts Mill Act, and to the various decisions thereunder and thereupon, with emphatic approval, sustain this claim.

The assertion in this opinion, contained, that the New Hampshire Act was "for the most part copied from the Massachusetts Act authorizing the owners of mills to flow lands of others paying damages assessed by a jury" is proof positive of the conclusiveness of this contention.

The decision in Head vs. Amoskeag Mfg. Co., 113 U. S., 9-26, was cited with approval in Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, in Wurts vs. Hoagland, 114 U. S., 606, and in Barbier vs. Connolly, 113 U. S., 27, and the principles therein declared have been reaffirmed in other cases which may be cited later in this brief.

As the defendant understands these cases just hereinbefore cited, they determine that such an act as this at present under consideration is valid, as a reasonable exercise of the power of the legislature having regard to the public good, as well as the rights of land owners along an unnavigable stream, to regulate the use of the water power of such stream, and that such exercise of legislative power is not required to be upheld as a taking by the delegation of the right of eminent domain of private property for public use in the constitutional sense, but rather upon the ground before stated, that such a statute "regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with due regard to the interests of all, and to the public good, is within the constitutional power of the legislature."

Head vs. Amoskeag Mfg. Co., 113 U. S., 9.

This was a writ of error to reverse a judgment of the Supreme Court of the State of New Hampshire, against the plaintiff in error, upon a petition filed by the defendant in error, for the assessment of damages for the flowing of his land by its mill-dam under the general Mill Act of that State.

Head objected that the statute was unconstitutional and that the petition could not be maintained because they contemplated the taking of his property for private use in violation of the 14th Amendment of the Constitution of the United States. His objections were overruled by the highest court of New Hampshire.

The proceedings in the state court were had under the general Mill Act of New Hampshire which provided that any person or any corporation authorized by its charter so to do, may erect or maintain on his or its own land a water mill and mill-dam, upon any stream not navigable, paying to the owners of land flowed the damages which upon a petition filed in court by either party, may be assessed by a committee or by a jury, for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam.

Mr. Justice Gray delivered the opinion of the court from which we quote certain extracts:

> "General Mill Acts exist in a great majority of the states of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these states, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were

passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet territories, and re-enacted after they became states. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia."

"In most of those states, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three states only, and for incompatibility with their respective constitutions." (The three states are Georgia, Vermont and Michigan.)

"The principal objects, no doubt, of the earlier acts were grist mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist mill which grinds for all comers, at tolls fixed by law, is for a public use."

"But the statutes of many states are not so limited, either in terms, or in the usage under them. In Massachusetts, for more than half a century, the Mill Acts have been extended to mills for any manufacturing purpose. Manufacturing Co. vs. Upham, 5 Pick., 292; Palmer Co. vs. Ferrill, 17 Pick., 58, 65; Stat. 1824, chap. 153. And throughout New England as well as in Pennsylvania, Virginia, North Carolina, Kentucky and many of the Western States, the statutes are equally comprehensive.

"It has been held in many cases of high authority, that Special Acts of incorporation, granted by the Legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for a public

use. Scudder vs. Trenton Delaware Falls Co., Saxt., 694, 728, 729; Mill Corporation vs. Newman, 12 Pick., 467; Hazen vs. Essex Co. 12 Cush., 475; Commonwealth vs. Essex Co., 13 Gray, 239, 251, 252; Hankins vs. Lawrence, 8 Blackford, 266; Mfg. Co. vs. Fernald, 47 N. H., 444.

"In some of those cases, the authority conferred by General Mill Acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others, for manufacturing purposes, has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water power and the promotion of manufactures. See also, Holyoke Co. vs. Lyman, 15 Wall., 500, 506, 507; Beekman vs. R. R. Co., 3 Paige, 45, 73; Talbot vs. Hudson, 16 Gray, 417, 426. And the validity of General Mill Acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions." (He then cites several opinions to this effect.)

* * * * "The statute now in question, the first general Mill Act passed by the Legislature of the State, was passed and took effect on July 3, 1868; was held in Ash vs. Cummings, 50 N. H., 591, after elaborate argument against it, to be constitutional." (Citing several cases.)

* * * * "The question whether the erection and maintenance of mills for manufacturing purposes under a general Mill Act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it.

We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the Legislature."

The opinion then goes on to speak of the compulsory partition of common interests in lands and that in many states if the estate is such that it cannot be divided it is either set off to one and he is ordered to compensate the others in money, or else the whole estate is ordered to be sold. It suggests that water rights may be the subject of partition in equity either by apportioning the time and extent of use or sale of the right and a division of the proceeds, and that one joint owner or tenant in common of house or mill may compel the other to sustain a portion of the burden of repair and maintenance.

Continuing the learned justice says:

> "The statutes which have long existed in many states, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have Commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property." (Citing numerous cases.)
>
> * * * * "But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.
>
> "The right to the use of running water is *publici juris*, and common to all the proprie-

tors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public: and to substitute, for the common law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury."

* * * * "Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other states, maintaining the validity of general Mill Acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the Legislature, having

regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of Pumpelly vs. Green Bay Co., 13 Wall., 166.

"Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the 14th Amendment of the Constitution of the United States. Walker vs. Sauvinet, 92 U. S., 90; Davidson vs. N. O., 96 U. S., 97; Hurtado vs. Cal., 110 U. S., 516; Hagar vs. Reclamation District, 111 U. S., 701."

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 154, 162.

This case was an appeal from a judgment of the Circuit Court of the U. S. for the Southern District of California, in an action brought to procure an injunction restraining the Collector of the Irrigation District from giving a deed of certain land on a sale by the Collector for the non-payment of an assessment under an act incorporating the Irrigation District, and to set aside such assessment upon the ground that the Irrigation Act of California was an infraction of the 14th Amendment of the Constitution of the United States.

The Court, through Mr. Justice Peckham, say in the opinion:

"The form in which the question comes before the court in this case is by appeal from a de-

cree of the United States Circuit Court for the southern district of California, perpetually enjoining the collector of the irrigation district from executing a deed conveying the land of the plaintiff * * under a sale made of such land pursuant to the provisions of the Act under consideration.

"The grounds upon which relief was sought were that the Act was in violation of the Federal Constitution and also of the Constitution of the state of California. The decree is based upon the sole ground that the Act violates the Federal Constitution in that it in substance authorizes the taking of the land of the appellee 'without due process of law.' Coming before the Court in this way, *we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a state court.*"

* * * * "The case does not essentially differ from that of Hagar vs. Reclamation Dist. No. 108, 111 U. S., 701, where this Court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the Federal Constitution.

"The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as *reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Head vs. Amoskeag Mfg. Co., 113 U. S., 9, 22; Wurts vs. Hoagland, 114 U. S., 606, 611; Cooley, Taxn., 2d Ed., p. 617.*

"If it be essential or material to the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. *In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.*"

Wurts vs. Hoagland, 114 U. S., 606.

This was a case in error to the Supreme Court of the State of New Jersey in which the plaintiffs in error sought to reverse a judgment confirming an assessment of commissioners for the drainage of land under the statute of New Jersey of March 8th, 1871.

Mr. Justice Gray in delivering the opinion of the court and quoting from the opinion in Coster vs. Tide Water Co., 3 C. E., Green 68-71, said:

"And to effect this object, the Acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of leg-

islative power, and may well be considered as included in the grant of legislative power in the Constitution."

After citing a series of drainage cases the learned justice proceeds to say:

> "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and lowlands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the Legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this Court upheld the validity of general Mill Acts in Head vs. Amoskeag Manufacturing Co., 113 U. S., 9."

Barbier vs. Connolly, 113 U. S., 27.

Mr. Justice Field who delivered the opinion of the court in the course thereof said:

> "But neither the [14th] Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase

the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good."

In passing it may also be suggested, that there are statutory restrictions on rights and privileges which may redound to the benefit of the public, and yet not constitute a taking by a delegation of the right of eminent domain, ~~or by the so-called police power of a state.~~

The defendant contends, as already suggested, that the Massachusetts "Mill Act" comes within such class.

E.

Constitution of Massachusetts, Part First, Article X.

* * * * "But no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Constitution of Massachusetts, Part the Second, Chapter 1, Section 1.

> "And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof. * * * *"

In brief the defendants contend that, although this Massachusetts "Mill Act" might well be declared valid and the erection and maintenance of a dam by virtue thereof and the consequent flowage upheld as an exercise of the right of eminent domain, yet it ought to be and has in effect been held by this Court not to be in violation of the 14th Amendment of the Constitution of the United States upon the broader and more logical reason that it is peculiarly within the province of the legislature of a state to enact laws that shall tend to the increase of its industries, the development of its resources and in general to the additions to its property.

It makes no difference if such legislation causes or may cause special burdens to or interference with the property or common law rights of an individual or individuals so long as public interests are conserved.

Before the Mill Acts one riparian owner could not erect a dam that should set the water back upon his neighbor's land without that neighbor's consent, and therefore manufacturing industries did not to any considerable extent exist, and thus it became necessary for the welfare of the State that there should be the enactment of such legislation as should give to the riparian proprietor who began occupation of his mill site

as such first, and who proceeded with reasonable despatch thereafter to develop power by the erection of a dam, the right or privilege to flow back upon the land or structure of his neighbor above on the same stream, the water thus ponded, the lower proprietor paying to the upper proprietor for any injuries so occasioned either such a gross sum or such annual damages as should be adequate compensation.

Not only were the primary objects of such legislation successfully accomplished, but also the secondary purpose, that of the prevention of a multiplicity of vexatious controversies and litigation.

F.

No title to the land flowed is acquired by a lower proprietor under this Mill Act, and no land is taken thereby.

It is true that under this "Mill Act" the land owner cannot obtain damages for an alleged restriction on the use of his land by the contemplated raising of the water thereon or thereover, until the flowage caused by the raising of the waters of the stream by the dam of the lower proprietor actually takes place.

It is also true that the owner of the mill-dam does not by proceeding under the "Mill Act" acquire any title to the land flowed, but only the *mere right* to raise the water by his dam, and that the owner of the land thereby flowed cannot draw off by canals, aqueducts or ditches the water, which has been raised by the dam of the lower proprietor.

It is also true that before the water is raised by the dam of the lower proprietor, the upper proprietor may dike, embank or dig canals on his own land.

These propositions are supported by the following cases:

Williams vs. Nelson, 23 Pick., 141.
Murdock vs. Stickney, 8 Cush., 113.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Manigault vs. Springs, U. S. Dec. 4, 1905
Hurtado vs. Hoagland, 114 U. S. 606
Barbier vs. Connolly, 113 U. S. 27

Paine vs. Woods, 108 Mass., 160.
Lowell vs. Boston, 111 Mass., 454.
Isele vs. Arlington etc. Bank, 135 Mass., 142.
Kenison vs. Arlington, 144 Mass., 456.
Turner vs. Nye, 154 Mass., 579.
Hazen vs. Essex Co., 12 Cush., 475.
Head vs. Amoskeag Mfg. Co., 113 U. S., 9.
Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89.

That is, the upper proprietor, being the owner in fee of the land afterwards flowed, had the right to use such land until actually flowed, for any such useful purpose as he saw fit, and to derive therefrom such income or profit as such land was capable of returning. He also had the right before the water was raised by the lower owner's dam to dike, embank, dig canals or erect barriers upon his own land that would prevent or limit the set back of water on his own land. If he chose to take advantage of none of the means of prevention or limitation within his power before the raising by the dam of the waters of the stream, his only recourse for relief or compensation, one or both, was the provisions of the "Mill Act" which the defendant contends and will later argue were constitutionally ample.

The title to the real estate still remained in the upper proprietor of which he could divest himself by deed that should carry with it to his grantee in the event that the land was flowed by the waters ponded by the dam of the lower proprietor, such rights as then inured or might thereafter inure under the act, against the dam owner, for instance, such as under § 3 of c. 190, the restriction and regulation by a verdict of a jury of the height to which the water might be raised; and under § 17 of the same chapter, the lowering or opening of the dam by verdict of a jury, and under § 18 by annual damages accruing since the delivery of the deed that may have been theretofore awarded, and under

§ 30 for increase of compensation. The instances might be further multiplied.

The upper land owner, of course, in the event of the legal abandonment of his mill site by the lower riparian proprietor would have full use of the land theretofore flowed by the dam, and the right to dispose of it as to him might seem best.

The plaintiff in error while the defendant's dam was in process of construction, and previous to the raising of the waters thereby, availed itself of the right conferred by some of the authorities just hereinbefore cited, to erect and did erect a stone embankment or barrier (its own dam) thus fixing a boundary, beyond which the waters when raised by the defendant's dam could not flow.

G.

The plaintiff was entitled to no notice of the acts of the defendant which it did not receive.

It is evidently the purpose of the plaintiff under its 15th, 16th, 17th, 18th, and 19th assignments of error to contend that there was a taking of the property and rights of the plaintiff in contravention of the 14th Amendment, without due process of law in that no notice of such taking was given to it by the defendant.

Plaintiff's claim under these assignments may be briefly stated as follows:

(15) Due process of law under the 14th Amendment requires that the act of appropriation be clear and intelligible.

(16) The occupation of the Red Bridge site under the authority of the statute was so ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

(17) The commencement of occupation of the Red Bridge site under the authority of said statute was so

ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

(18 and 19) The construction of the tail race of the defendant on August 3, 1899 under the authority of said statute was so ambiguous and unintelligible that no appropriation of water power or property of the plaintiff was indicated, and, therefore, there was no such appropriation.

The plaintiff's position, however, as thus stated appears to be *not that there was no notice of the appropriation*, but that the *notice was so ambiguous and unintelligible as not to indicate the extent of such appropriation* of plaintiff's water power and property.

Neither in its pleadings nor by objections or exceptions to the Master's report did the petitioner raise the question of insufficiency of notice, but it is first suggested in the assignments of error. The question was, therefore, raised too late to receive the consideration of this Court. Moreover, the determination of this issue, if material, was surely for the State Court and does not involve a Federal question.

However, for purposes of argument, enlarging the scope of the assignments of error noted above (15, 16, 17, 18 & 19) so as to give the plaintiff the full benefit of its contention, now presented, with reference to notice, the following suggestions naturally arise:

If it be the contention of the plaintiff that before doing any of the acts necessary to constitute an appropriation of water power, as pointed out in the many decisions upon the subject, actual notice of such intention and of the scope and extent of the proposed work should be given by the appropriator to any person whose property will be affected, of what advantage would such notice be to the latter?

Certainly not to enable him to prevent the appropriation, because that result would be to nullify the act itself.

An upper proprietor receiving such notice would immediately with an assumption of good faith commence the development of his privilege and by the erection of an inexpensive saw mill or grist mill thereby compel the lower proprietor to abandon his enterprise or submit to extortionate demands.

Notice which could not be thus availed of would be a mere empty form, and hence the omission of such requirement in the act does not amount to any practical hardship to the upper proprietor. In other words, it would be impracticable.

Even under statutes permitting takings by right of eminent domain prior notice is not required.

The Legislatures of Massachusetts and other states have repeatedly passed acts permitting municipalities to take lands and water rights for the purpose of establishing or enlarging their water supplies containing no requirement for prior notice, but providing that within a prescribed period after such taking there shall be filed in some designated place of record a description of the property taken sufficiently accurate for identification.

Cases involving such acts have again and again been before the courts, but no such act has ever been held unconstitutional because of its failure to provide for notice before the taking.

In passing upon other similar acts involving the taking of or interference with private property, the Supreme Court of Massachusetts has repeatedly held prior notice to be unnecessary.

See Allen vs. Charlestown, 111 Mass., 123, 124.
Holt vs. City Council of Somerville, 127 Mass., 408, 410.
Gately vs. Old Colony R. R. Co., 171 Mass., 494.
Appleton vs. Newton, 178 Mass., 277, 281.
Lancy vs. Boston, 185 Mass., 219, 221.

Such a statute (Mass. Stat. 1867. c. 308) was by this Court in Sweet vs. Rechel, 159 U. S., 380, in an opinion by Mr. Justice Harlan held to be constitutional.

If then, applying this principle to the appropriation of water power, an upper proprietor has notice at any stage of the proceedings his rights are fully protected.

Spencer vs. Merchant, 125 U. S., 345.

C. B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

Cincinnati N. O. & T. P. R. R. Co. vs. Kentucky, 115 U. S., 321.

The plaintiff, however, in fact received notice of the acts and intentions of the defendant both (a) constructive and (b) actual.

(a) Constructive Notice.

March 30, 1900 defendant filed with the County Commissioners plans and specifications of its proposed dam (Record p. 65) as required by P. S. c. 190 § 52, which provides:

> "No reservoir, reservoir-dam, or mill-dam shall be constructed or materially altered, until plans and specifications of the proposed work have been filed with and approved by the county commissioners of the county where it is to be done. Said commissioners shall retain and record such plans and specifications, and shall inspect the work during its progress; and if at any time it appears that the plans and specifications are not faithfully adhered to, they may appoint an inspector to be constantly engaged at the expense of the owners in the supervision of the work; and upon a refusal of the owners or of their agents to adhere to said plans and specifications, said inspector may order the discontinuance of the work: *provided* however, that nothing contained in this and the six following sections shall apply to small dams, constructed for irrigation or for other purposes, the breaking of which would involve no risk to life or property."

It must be assumed that the plaintiff in error had knowledge of this section and also of the Acts of 1897 c. 439 , §§ 1, 7 (R. L. c. 35 §§ 5, 17), the material portions of which are as follows:

> Section 1. "The words 'public records' when used in this or any other act shall, unless manifestly inconsistent with the context, be construed to mean any written or printed book or paper, or any map or plan of the Commonwealth or of any county, city or town in or on which any record or entry has been or is to be made in pursuance of any requirement of law, or any written or printed book or paper, or any map or plan which any officer or employee of the Commonwealth or of any county, city or town is required by law to receive, or in pursuance of any such requirement has received for filing, * * "
>
> Section 7 of this Act provides: "Every person having the custody of any public records shall on request for any public record in his custody furnish the same for inspection and examination under his direction, supervision and care, or under the direction, supervision and care of some person designated by him, and shall on request for a copy of any public record in his custody, and the payment of a reasonable fee, furnish such copy; provided, however, that the inspection and furnishing of copies of the public records of a city or town shall be subject to the reasonable ordinances of the city or by-laws of the town."

In Bailey vs. Miltenberger, 31 Pa. St. 37, the plaintiff sued for breach of a covenant of warranty contained in a deed of real estate in the city of Pittsburg. Nearly eight years before the date of the plaintiff's purchase the legislature had authorized the city to lay out and open a street and wharf over the land in question; and nearly five years before the date of the purchase, the city had exercised that authority by passing the necessary ordinances and causing plans to be

made out and filed in the offices of the proper public officials, and by taking other steps proper to that end. Subsequently to the plaintiff's purchase the street was opened through the land and the plaintiff contended that the title of the defendant, his grantor, had been divested by the act of the legislature, and that this constituted a breach of the covenant of warranty. The judge of the lower court instructed the jury thus:

> "If * * * notice to the purchaser were at all necessary, he undoubtedly had constructive notice of all the material facts connected with the authority and acts of the city in relation to this street and wharf. He was bound to know the Act of 31st. of March, 1836, and all the ordinances duly passed by the councils of the city, and recorded under and in pursuance of that act, as well as the plans of the street and wharf made and filed according to its provisions, and how they affected the property he was about to purchase."

The Supreme Court affirmed the correctness of the instruction.

It may be argued that the purpose of section 52 is merely to provide for the safety of dams and thereby to afford protection to the public, but even though that may be the primary object, the section is to be found in the same chapter as are the other provisions which relate to the present controversy and must be said to be a part of the Mill Act of the Commonwealth.

Except as above the statute does not require any notice to be given by one owner to another of such owner's intention to occupy his mill site, or to erect a dam which may flow back upon the land of the other, nor does the statute require after the commencement of such occupation by one owner any notice to the other of that fact or of the extent of flow which may be caused by the dam in process of erection. No decision under the Mill Acts intimates that any notice is necessary

in order to render effective such occupation or the commencement thereof.

Head vs. Amoskeag Mfg. Co., 113 U. S., 9.

(b) Actual Notice.

The Otis Company knew in the fall of 1899, that the Ludlow Manufacturing Company were engaged in the work preparatory and necessary for the erection of a dam upon the site of the Red Bridge dam. (Record pp. 63, 64.)

From the fall of 1899 the work which was being done by the Ludlow Manufacturing Company at the site of its dam could be plainly seen by a person passing along on the highway, and said work was at all times from August, 1899, visible from the railroad track (Record p. 64).

The directors of the Boston & Albany Railroad Company and of the Ludlow Manufacturing Company had consulted at the site of the dam with reference to the change of location of the track, which change was subsequently made (Record pp. 37, 38).

Bliss, Fabyan & Company were the authorized agents and managers of the plaintiff. Their knowledge was the knowledge of the plaintiff and notice to them or to Mr. Olsen of that firm was notice to the plaintiff (Record p. 64).

The engineer of the plaintiff, evidently on the watch, on April 3, 1900, wrote to the plaintiff's superintendent the following letter the contents of which, clearly indicating to one familiar with the situation that the dam of the defendant would flow land of the Otis Company and deprive it of a portion of its fall of 19.65 feet at its alleged lower privilege, were communicated to said Olsen April 4, 1900.

Springfield, Mass., April 3, 1900.

Mr. R. C. Newell,
Three Rivers, Mass.

Dear Sir:— You may have heard that the Ludlow Co. has submitted plans and specifications of its *proposed new dam at Red Bridge*

to the county commissioners for their approval. I saw the plans this afternoon and they call for a dam 48 feet high above extreme low water, or some 33 feet above the railroad at the site of the dam.

Yours truly,
J. K. Barker.

When the county commissioners approve the plans of the Ludlow Co. will this complete the appropriation of the power?

(Exhibit 161, Record p. 63.)

That the situation was fully appreciated appears from the correspondence between Newell and Bliss, Fabyan & Co. which followed (Exhibits 163, 162 & 164, Record pp. 70, 71), from which these extracts may be noted.

"Another point that would also seem to be well to ascertain from Mr. Gardner would be if it would not answer every purpose to preserve our privilege if we were to put in *a dam only 5 or 6 feet high* and establish *a saw mill or any other cheaply constructed mill*, so that we could limit the amount of expense there to a minimum sum until such time as we saw fit to enlarge our dam and privilege for the transmission of electricity or other purposes.

"It seems to the writer that our main purpose at the present time should be to preserve our privilege at the smallest expense possible, and then having done so whether that would not establish our rights for all time to put up any structure and dam of any size we saw fit, so as to develop the water power to its fullest extent, if we should sometime wish to do so." (Exhibit 163.)

"The erection and maintenance of a *saw mill, or any other 'mill' of cheap construction* with a low dam just sufficient to afford necessary power

for operation would preserve our rights." (Exhibit 162.)

"In reference to the building of a dam at Three Rivers on the Otis Company's privilege, we are all unanimously of the opinion that something should be done to preserve our rights, and that a timber dam should be started as soon as possible, somewhat in accordance with the suggestions made of a dam 6 or 10 feet high, so as to get it in at the earliest possible moment with the least delay and expense." (Exhibit 164.)

Thus it appears that the determination made by the plaintiff on April 4, 1900, to erect a dam did not comprehend the dam subsequently erected by it, but was for the purpose of preventing the appropriation by the defendant under its prior determination which the plaintiff then knew had been made (Record p. 73.)

And it is further established that no determination of the plaintiff upon April 4, 1900, to erect a dam was arrived at until after notice of the Ludlow Manufacturing Company's determination and commencement to erect a dam which would flood the plaintiff's dam and alleged mill site to the extent to which they are flooded by the present dam of the Ludlow Manufacturing Company (Record p. 73.)

Having actually received notice of the acts of appropriation of the defendant the plaintiff is not entitled to relief, by reason of the fact that the Mill Act may not in terms contain a provision requiring notice.

Tyler vs. Judges of Registration, 179 U. S., 405.

C. B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

Reetz vs. Michigan, 188 U. S., 505

Detroit etc. Railway vs. Osborn, 189 U. S., 383.

Notice is a local question.
Castillo vs. Mc. Conico, 168 U.S. 674.

H.

This "Mill Act" accords to this plaintiff in error constitutional compensation for damages sustained by it.

"Compensation" is the term employed in the "Mill Act."

It is significantly the same term used in the Massachusetts Declaration of Rights. (Constitution of Massachusetts, Part First, Article X.)

The word "compensation" is ample in scope and broad in meaning. No stronger word could be thought of in this connection. It means that which constitutes or is regarded as an equivalent; that which makes good something lost, that which compensates for deprivation. It means remuneration, recompense.

Now the Public Statutes, chapter 190, § 4 (Revised Laws, chap. 196, § 4) provide as follows:

> "A person, whose land is overflowed or otherwise injured by such dam, may obtain *compensation* therefor upon his complaint before the superior court for the county where the land or any part thereof lies, * * * * *"*

Section 3 provides that "The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury."

Then follow the provisions as to what such complaint shall contain, where the same shall be filed, how and where served, and the pleadings that shall follow, et cetera.

The Act contemplates a trial by jury.

Under the Act § 17, a jury "shall decide how much, if any, the dam shall be lowered."

> Section 18 provides that the jury shall "ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant,

would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid."

Section 22 provides that the person entitled to receive the annual compensation, or gross damages, shall have a lien therefor from the date of his complaint on the mill, mill-dam and land, and that the lien shall comprehend any sum due within three years before the commencement of the action.

Section 23 provides that an action may be maintained against any person who owns or occupies the mill when the action is brought, and that in such action recovery may be had for the whole sum due and unpaid for three years then last past, whoever has owned or occupied the mill during that time.

Section 24 provides for the satisfaction of the lien.

Section 30 provides that if the upper proprietor is dissatisfied with the annual compensation rendered by a jury, he may bring a new complaint for an increase of such compensation, or for ascertaining the gross amount of the damages.

Section 31 provides that such new complaint may be maintained by and against either of the parties to the original suit or by and against a person lawfully holding under either of them.

It is difficult to conceive of a more comprehensive protection to the rights of an upper riparian proprietor than is provided for by this Act. In every manner and form he is safeguarded and shielded.

The highest court of Massachusetts in language unmistakable have said in this very case, as follows:

"It is enough to say that in our opinion the provision for compensation for damages is ade-

quate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the Constitution."

Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 95. (Record p. 116.)

Head vs. Amoskeag Mfg. Co. 113 U.S. 9
Manigault vs. Springs 199 U.S. Dec. 4, 1905
Madisonville vs. Lake Erie & W. R.R. 196 U.S. 162

I.

The principles and elements of damage are not open for consideration in this case.

The only question before this Court is whether the plaintiff in error has been deprived of its property without due process of law contrary to the provisions of the 14th Amendment of the Constitution of the United States.

There is no requirement in this proceeding for a construction or interpretation of what elements of damage are comprehended by the phrase "reasonable compensation" used in this "Mill Act".

It is enough to say that it is the constitutional term and to the state court should be relegated at least in the first instance, when the occasion shall arise, the privilege of determining what elements shall be considered in arriving at the "reasonable compensation" which this plaintiff in error is entitled to or may in the future be entitled to by reason of the raising of the waters of the stream by the lower riparian proprietor, the Ludlow Manufacturing Company.

This plaintiff within the statutory limits has filed against this defendant a complaint under § 4 of the Act, for compensation on account of the erection and maintenance of the dam in question. That complaint is now pending in the Massachusetts Courts.

When there shall have been a ruling in that action by the highest state court on the question of what elements

of damage are comprehended by the constitutional and statutory term "compensation," then if ever and not till then can there be occasion or opportunity for this Court to pass upon the question as to whether there has been deprivation of or invasion of or interference with the plaintiff's common law rights by virtue of this statute without "reasonable compensation therefor."

In this case the Supreme Judicial Court of Massachusetts have said:

> "It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for an interference under statutory authority with his right at common law to use the water of a stream without obstruction, where such interference is permitted in the regulation of the rights of different owners, as necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff in view of existing conditions."
>
> Otis Co. vs. Ludlow Mfg. Co. et al., 186 Mass., 89, 93. (Record p. 116.)

In effect the Court say that when occasion shall arise upon the complaint of this plaintiff under the "Mill Act" it will decide what principles and elements of damage are comprehended by the words "reasonable compensation."

J.

Due Process of Law.

In view of the foregoing suggestions and citations, the defendants contend that the plaintiff has not been deprived of its property without due process of law.

It has had its day in the Courts of Massachusetts, and a full and fair hearing therein; it has appealed to the "Mill Act" of that State for a remedy for an alleged wrong, and there were such procedings as were

appropriate to the nature of the case. It has claimed that that Act should have a particular and peculiar construction in its favor.

The highest court of Massachusetts has construed the act to which the plaintiff has appealed for relief, contrary to the interpretation which the plaintiff desired. That court followed the clear and repeated decisions of the highest court of the State for seventy-five years, which has repeatedly announced the object and the purpose of the statute. It bore carefully in mind the fact that reasonable compensation was provided for restriction upon the use of land caused by water set back by a statutory dam.

The plaintiff being dissatisfied with the construction given by the court to the statute to which it appealed for protection, arrives in this court with the alleged grievance that its property has been taken away without due process of law.

The defendant claims that the plaintiff has had the process of law due according to the law of the land and therefore "due process of law."

Marchant vs. Pennsylvania R. Co., 153 U. S., 380, 385.
Davidson vs. New Orleans, 96 U. S., 97.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 157, 158.
Walker vs. Sauvinet, 92 U. S., 90.
Kennard vs. Morgan, 92 U. S., 480.

As was said by this Court in Marchant vs. Pennsylvania R. Co., 153 U. S., 380, 385, so might well be said here:

> "It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.'
>
> "The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself.

> In those courts her rights were measured, not by law made to effect her individually, but by general provisions of law applicable to all those in like condition."

In the case of Davidson vs. New Orleans, 96 U. S., 97, 104, this court say through Mr. Justice Miller.

> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or *such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.
>
> "It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, * * * * * * * * .
> But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the

> State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

The plaintiff may place reliance upon Pumpelly vs. Green Bay Co., 13 Wall., 166. That case is readily differentiated from the present for the reasons pointed out in Head vs. Amoskeag Manufacturing Co., supra.

K.

A decision that as between riparian proprietors priority of occupation gives the better right is not contrary to the 14th Amendment of the Constitution of the United States.

The question of fact that was decided in favor of the defendant cannot be reviewed by this Court.

> Backus vs. Ft. Street Union Depot Co., 169 U. S., 557, 566.

The defendant further asserts that the construction which the highest court of Massachusetts gave to the statute, which in effect was that priority of occupation gave the first right, is for the reasons previously stated and upon authorities previously cited, not now open to question.

But if peradventure such construction can now be taken into consideration, its correctness would seem almost indisputable in view of the reasoning thereupon contained in the opinion of the Massachusetts Supreme Judicial Court in this case to be found on pp. 114, 115 of the Transcript of Record, and of the history and objects of the "Mill Acts" which are considered in (B) and (C) of section II of this brief.

L.

The construction that the act applies as well to upper as to lower owner is not unconstitutional.

While the defendant claims that the above construction cannot now be questioned, it at the same time contends that such interpretation does no violence to the 14th Amendment.

If the contrary construction should be had the reasons for and objects of the "Mill Act" would be nullified.

A logical and reasonable construction of chapter 190, Public Statutes of Massachusetts, is that after a lower proprietor at great expense has commenced the development of water power and the construction of his dam and mill, in the exercise of the right given him by statute, and is continuing the same to completion with reasonable despatch, an upper proprietor, who, up to such commencement had not utilized his common law right to develop a fall of water upon his own land, shall not then be permitted to step in and neutralize the efforts of the lower proprietor by commencing and carrying to hurried completion, a cheap dam of his own and therby transform such lower proprietor's large expenditure from a profitable investment into an utter loss.

The plaintiff's interpretation of the statute instead of decreasing controversies would increase them, and tend to unsafety of dams and peril of human life and property, by inducing and promoting races between proprietors for swift construction and completion of their respective dams. Under the interpretation of the plaintiff a lower proprietor might begin and proceed with the erection of a structure that would endure for a century and that would when complete give large results, both to himself and to the community; and when he had incurred an expenditure of a million dollars, and had brought his dam within a week or a day of completion, see his efforts wasted, his expendi-

tures come to naught, and himself financially ruined by an adjacent upper proprietor who had within that week or day thrown across the stream above a cheap log dam.

In connection with and in support of (K) and (L) the following authorities are respectfully submitted:

Bigelow et al. vs. Newell, 10 Pick., 348.
Washburn's Treatise on the American Law of Easements and Servitudes (4th Ed.) chapter 3 § 5, paragraph 19.
Storm vs. Manchaug Co. et al., 13 Allen, 10.
Dean vs. Colt et al., 99 Mass., 486.
Miller et al. vs. Troost et al., 14 Minn., 365.
Kelly vs. Natoma Water Co., 6 Cal., 105.
Kimball et al., vs. Gearheart et al., 12 Cal., 27.
Parke vs. Kilham, 8 Cal., 77.
Ortman et al., vs. Dixon, 13 Cal., 33.
Ophir Silver Mining Co. vs. Carpenter, 4 Nev., 534.
Irwin vs. Straitt, 18 Nev., 436.
New England Hospital vs. Boston, 113 Mass., 518.
Trinity Church vs. Boston, 118 Mass., 164.
Otis Company vs. Ludlow Mfg. Co., *supra.*

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ADDITIONAL POINTS

In Support of Defendant's Argument.

No Federal question was properly called to the attention of the State Court by the plaintiff.

The only request made by the plaintiff which by any possibility raises a Federal question is its second request (Record, p. 76), which is as follows:

> "That if said section 2 does authorize the owner of such lower mill site to flow and injure an upper mill site, under the circumstances stated in the last-stated request, then said section is in violation of the Constitution of the United States and of the Constitution of Massachusetts."

This request does not raise any Federal q tion for the following reasons:

1. It does not specify in what way the Constitution is violated.

2. It does not state what part of the Constitution is violated.

3. It does not deny the constitutionality of the entire statute, but only a certain section thereof.

It is also to be noted that nothing is said in this second request which raises the question that the Mill Act is void because its provisions as to notice are inadequate or that its provisions for compensation are insufficient, and no claim is made therein with reference to taking private property for private uses.

The plaintiff objected to the master's report because the master did not make certain rulings.

With the exception of the 18th objection (Record, p. 83), which related to its second request, the plaintiff did not ob-

ject to the rulings made by the master, but founds its objections upon the fact that the master did not make certain rulings which were not requested by it. Therefore its objections can be availed of only so far as they are based upon the refusal of the master to give the rulings requested or upon other actual rulings made by the master.

After the filing of the master's report in the case the plaintiff filed certain exceptions.

These exceptions can be taken advantage of by the plaintiff only so far as they were based upon objections made before the master and appearing in the record.

Referring to these exceptions by their respective numbers (Record, pp. 91–94), it will be seen that—

1 to 5, inclusive, are based on findings of fact.

6 does not raise any Federal question.

7 is too general and does not specify wherein the due process of law clause of the 14th Amendment is violated.

8 to 17, inclusive, raise no Federal question.

18 is founded upon the failure of the master to give the second request asked for, which has already been referred to.

19 to 33, inclusive, raise no Federal question but those which were either questions of fact or purely local.

The only exceptions which can be said to relate to any constitutional question are the 7th and 18th, and the latter is the only one which is based upon any prior request or objection, and neither of them properly specify wherein the Constitution of the United States is violated.

No justification can be found in the record for the plaintiff's 10th, 11th, 12th, 13th, 14th, and 21st assignments of error (Record, pp. 106, 107) with reference to alleged inadequacy of statutory provision for just compensation, because the only objection with respect to compensation was in the plaintiff's 8th objection (Record, p. 82), which in substance alleges that if a riparian proprietor, by beginning the occupation of his land or the commencement of a dam thereon, shall acquire the right thereafter to flow lands of an upper proprietor "such provision is contrary to the *fifth*

amendment of the Constitution of the United States and void, in that it authorizes the taking of private property without just compensation."

And the only exception in which the attention of the court was called to the question of compensation is the plaintiff's 8th exception (Record, p. 92), which relates to the fifth amendment.

The question of compensation was nowhere and at no time called to the attention of the State Court except as comprehended in the objection and exception which relate to said fifth amendment.

Neither can the plaintiff prevail under its 15th, 16th, 17th, 18th, and 19th assignments.

These refer to the character of the taking and allege that it was uncertain and ambiguous.

The plaintiff made no prior request, objection, or exception upon which these assignments can be founded.

It is submitted that the plaintiff cannot now claim that the statute in question is unconstitutional because there is no provision therein requiring notice to be given to a riparian proprietor before his land is flowed, for the reason that the plaintiff makes no such claim in any of its assignments of error, or in any of its requests to the master, or in any of its objections or exceptions to his report.

For the same reason the plaintiff cannot claim that chapter 190 of the Public Statutes of Massachusetts violates the 14th Amendment because it authorizes the taking of private property for private purposes.

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and actual use of the water within a reasonable time" (Record, p. 114).

The right of a lower proprietor is inchoate, and no right to flow lands of an upper proprietor is gained by the lower proprietor after beginning his appropriation or occupation

and commencement of his dam, unless the same be "*followed by a completion of the work and the actual use of the water within a reasonable time.*" If he fails to complete his dam and within a reasonable time to flow lands of the upper proprietor, he obtains no right as against the latter. Right to flow is gained when the dam shall have been completed and the flowing thereby has taken place, and not before.

No Federal question is involved in this aspect of the case but merely one of fact for the State Court.

No real estate vests in the lower proprietor at any time, but from the time of flowing there is simply an interference with the upper proprietor's use thereof.

Manigault *vs.* Springs, U. S., Dec. 4, 1905.

Plaintiff may contend that the master correctly ruled that plans filed by the defendant March 30, 1900, were not notice to the plaintiff of defendant's intention to build its dam.

If the master so ruled and if the question becomes material, such ruling was erroneous as a matter of law for the reasons previously stated in this brief (pp. 62, 63).

This ruling of the master was duly excepted to by the defendant (5th exception, Record, p. 95).

The question was not passed upon by the State Court, but if the ruling was wrong it can be corrected by this Court.

The plaintiff may also contend that Mass. P. S., c. 190, violates the due process of law clause of the 14th Amendment because it failed to provide payment in advance of damages, or to sufficiently provide security for the same, and may quote the language of State and Federal courts contained in certain cases in support of this contention, such as *Cherokee Nation vs. Southern Kansas Ry. Co.*, 135 U. S., 641; *Williams vs. Parker*, 188 U. S. 491; *Norwood vs. Baker*, 172 U. S., 269, 277; *Att'y Gen'l vs. Old Colony Ry.*, 160 Mass., 62, 90; *Ash vs. Cummings*, 50 N. H., 591; *Conn. River R. R. vs. County Commissioners*, 127 Mass., 50.

Most of the above cases were the result of special acts of legislation, the provisions of which required either the payment of money into court for compensation or for security

for interference with or taking of property prior to such interference or taking, or else provided that compensation should be paid from the uncertain earnings of a railroad, and do not support the contention suggested above.

Cherokee Nation *vs.* Southern Kansas Ry. Co. (*supra*) arose under act of Congress of July 4, 1884 (St. 73, c. 179), which conferred the right to construct a railroad through the plaintiff's lands, and specially provided that before the defendant could enter upon the lands of the plaintiff it must deposit an amount double the award of commissioners, to be made *after* their award.

Williams *vs.* Parker (*supra*) arose under a statute of Massachusetts providing that no building shall be erected above a certain height, and that any person interested in a building in course of construction may recover damages within two years against the city of Boston. In this statute there was no provision for advance payment of or security for damages, and the statute was held to be constitutional.

The court says in this case, in substance, that no question was raised as to the general solvency of the city of Boston, and that the question of solvency does not seem material.

Att'y Gen'l *vs.* Old Colony Ry. (*supra*) involved the interchangeable mileage act of Massachusetts, and in holding the act unconstitutional the court based its opinion upon the fact that there could be no restoration to a railroad of money which might have been taken by another railroad, but which really belonged to the former, in case of the latter railroad's insolvency.

Ash *vs.* Cummings (*supra*) arose under the mill act of New Hampshire, the material sections of which are as follows:

> SEC. 1. Any person or any corporation authorized by its charter so to do may erect and maintain on his or its own land or upon land of another, with his consent, a water mill and dam to raise the water for working it, or for creating a reservoir of water, and for equalizing the flow of the same for its use and of mills below, upon and across any stream not naviga-

ble, upon the terms and conditions and subject to the regulations hereinafter expressed.

Section 2 provides that if any person's land shall be overflowed by use of such dam and if said damage or injury within thirty days after due notice thereof shall not be satisfactorily adjusted by the party erecting or maintaining the dam, either party may apply by petition to the Supreme Court to have damages that may have been or may be done assessed, and after reasonable notice to all interested parties the court shall refer the petition to a committee of three disinterested persons to determine in relation to the matter set forth therein.

SEC. 3. The committee shall hear the parties and view the premises, and if they shall decide that the dam causing the flowing is of public utility or benefit, and that the same is necessary for use of the mill for which it is designed they shall estimate damages and report to the court. The court may inquire for itself whether the erection of the dam is of public benefit. If the report shall be accepted the court shall render judgment thereon, which judgment shall be final and execution may issue.

SEC. 4. No person or corporation shall derive any title from said proceedings or be discharged from any liability in relation to said premises until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment.

This act provided for the flowing of lands by waters impounded by the dam of a lower proprietor *without notice* and *without an opportunity to an upper proprietor to be heard prior to such flowing*. The court sustains the constitutionality of the act, but suggests that upon application by an owner of land flowed the court might order a deposit of money or other security for compensation for damages, and if such order was complied with the court would refuse an injunction. This suggestion was not because of language in the statute which gave authority therefor, but because of the general equity powers vested in the court.

In Conn. River R. R. *vs.* County Commissioners (*supra*) the court held a special act unconstitutional because no person or corporation, or the State, or the manager of the railroad was made liable for damages, but the person or estate damaged was compelled to look for reimbursement to the possible earnings of the road.

There was no provision for securing damages that might be awarded, nor for notice until after the taking in the following cases:

Warren *vs.* Spencer Water Co., 143 Mass., 9.
Hamer *vs.* Bar Harbor Water Co., 78 Maine, 127.
Gloucester Water Supply Co. *vs.* Gloucester, 179 Mass., 365.
Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394.

And it is to be remembered that the notices required after the takings in the above cases were by statutes providing for the filing in the registry of deeds or some designated place of record a description of the lands taken.

In the case at bar there is no allegation in the plaintiff's bill of complaint of pecuniary irresponsibility of the defendant, or that the value of the property of the defendant upon which, under this mill act, the plaintiff could have a lien for damages is insufficient for satisfaction thereof, nor is there a prayer in the plaintiff's bill requesting a deposit of money or other security for the damages which the plaintiff might suffer by reason of the flowing back upon its land of the waters raised by the defendant's dam.

Had there been such allegation or prayer the court, under its general equity jurisdiction (P. S., c. 151, sec. 4), if satisfied of the truth of the allegation or the necessity for a deposit of money or the giving of other security, might in its discretion have so ordered.

Ash *vs.* Cummings, 50 N. H., 591.
Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394.
Manigault *vs.* Springs, U. S., Dec. 4, 1905.

Moreover, the defendant contends that the plaintiff could choose to pursue one of two courses under the Mill Act of Massachusetts. It could elect to take its damages under

the statute or to dike, trench, or erect an embankment or barrier upon its own land to prevent the same from being flowed by the defendant's dam.

Manigault *vs* Springs (*supra*).

In various acts of legislation other than the mill acts in various States, granting rights and privileges to individuals or private corporations, there are to be found substantially similar provisions as are contained in this Mill Act, and no provision for the deposit of a fund or for other security in advance of actual taking or interference. The constitutionality of such acts has been repeatedly upheld by this Court.

Sections 18–27 of the Massachusetts Mill Act (P. S., c. 190) are in accord with the constitution as providing sufficiently for compensation.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE OTIS COMPANY, PLAINTIFF IN ERROR
vs.
THE LUDLOW MANUFACTURING COMPANY AND THE LUDLOW CORDAGE COMPANY.
} No. 73.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Reply of Defendants to Motion of Plaintiff in Error.

The defendants in this action object to the allowance of the motion of the plaintiff in error to amend the judgment herein, and as the basis for such objection assign the following reasons:

Said judgment as rendered sufficiently preserves the rights of the plaintiff in error.

The discretion of the State Court may be relied upon to determine which of the two alternatives presented to it by the judgment of this Court will best preserve the rights of the parties.

The parties have not been heard in this Court upon this feature of the case, and as the defendants understand the rule and practice the matter cannot now be discussed here orally, but this may be done in the State Court, and evidence may, if necessary to the consideration of the question, be introduced there.

The only reason advanced by the plaintiff in error for retaining the bill is an assumption that the delay and expense attendant upon the former trial would be necessary to again present the constitutional question to this Court.

The record shows that a stipulation covering the principal facts reasonably essential to a determination of the constitutional question has been entered into between the parties, that at the hearings in the State Court much time

was devoted to the consideration of the so-called Metcalf Agreement, the progress of the work of the respective parties and other matters, all of which being local questions have now been determined and cannot hereafter arise in any further proceedings.

It is, therefore, respectfully submitted that if the State Court in its discretion should determine that the bill should be dismissed without prejudice, and if further proceedings in this Court shall become necessary, the same can be had without unreasonable delay or expense.

WILLIAM H. BROOKS,
JAMES B. CARROLL,
WALTER S. ROBINSON,
Defendants' Attorneys.

Supreme Court of the United States.

No. 73.—October Term, 1905.

The Otis Company, Plaintiff in Error, vs. The Ludlow Manufacturing Company and The Ludlow Cordage Company. } In Error to the Superior Court of the State of Massachusetts.

[March 12, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity to restrain the defendants in error from flooding the plaintiff's land by means of a dam erected under the Massachusetts Mill Act. The injunction is asked on alternative grounds—either that the Mill Act does not authorize the dam, or that, if it does, then it is contrary to the Fourteenth Amendment of the Constitution of the United States. The case was tried in the Superior Court and reported to the Supreme Judicial Court, which held that the statute authorized the dam and was valid, and ordered the bill be dismissed. 186 Mass. 89. A decree was entered in accordance with the rescript and the case then was brought here. The claim under the Constitution was distinctly set up in the bill, and was insisted on at every stage. The Court could not have decided as it did without overruling that claim, so that the jurisdiction of this Court is clear, although it was denied.

The dam in question is built across the Chicopee River, a non-navigable stream, at Red Bridge. It was begun, in pursuance of a long previous determination, on August 3, 1899, and was completed within a reasonable time. The plaintiff owned a mill and dam, more than two miles above, and land below its dam on the two sides of the watercourse, down to within about two miles from the principal defendant's dam. On April 4, 1900, the plaintiff determined to build a dam near its lower boundary, and began the work of construction on August 11 of the same year. This dam was completed before, although it was begun after, the defendants', and will be rendered nearly or wholly useless by the back flow from the defendants' structure. The plaintiff's original dam and mill will not be interfered with. The Supreme Judicial Court decided that under the statute then in force, Pub. Sts. c. 190, § 2, the principal defendant, herein called the defendant, acquired the prior right, and that the statute was

constitutional. It postponed the consideration of the plaintiff's rights in reference to damages, but decided that the provision for compensation was adequate to satisfy whatever rights the plaintiff might have.

The only question which it is necessary for us to consider is whether the act as construed violates the Fourteenth Amendment.—General objections to Mill Acts as taking property for private use or on other grounds have been disposed of by *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9. See further, *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.* [Feb. 19, 1906.] Such acts have been in force in Massachusetts ever since an act of 1714, c. 15. 1 Prov. Laws, 729. The practice sanctioned by them would seem from the recitals of that act to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watchings and wardings one miller to each grist mill; Act of 1693, c. 3, § 13; 1 Prov. Laws, 130; and in the public duties which were expressed in the Act of 1728, c. 6, § 3. 1 Prov. Laws, 497. But at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams as there understood.

However, the liability of upper land to be flowed is not a liability to be flowed without payment. The principal objection made to the law is that it makes no adequate provision for payment, if it is construed as it has been construed by the State Court. There has been no substantial change in the form of this provision for the better part of a century. It reads: "A person whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint." Pub. Sts. c. 190, § 4. The jury is to take into consideration damage to other land as well as the damage to the land overflowed. § 14. It is to assess the damages sustained within three years, § 16, and to determine what sum, to be paid annually, would be reasonable compensation for the damages that may be occasioned thereafter, and also a sum in gross for all damages from the use of the dam in the manner fixed by it, § 18, the jury having power to regulate the height of the dam. § 17. The complainant is given an election to take the gross sum, in which case the owner of the dam loses all benefit of the act after three months until he pays. §§ 19, 20. Otherwise the complainant has an action for the annual compensation and a lien on the dam and lands used with it. §§ 21 *et seq.* And, finally, if dissatisfied with the amount of the annual compensation, he may bring a new complaint. § 30.

In considering whether these provisions are sufficient it is important to know exactly what the upper owner loses by the dam. The State Court lays it down that there is no taking under the right of eminent domain. 186 Mass. 95. We assume this to mean what often has been said with regard to the Mill Acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm* v. *Manchaug Co.*, 13 All. 10, 13; *Lowell* v. *Boston*, 111 Mass. 454, 466; although the language has not been uniform and it seems to have been held otherwise when the damages are paid in gross. *Isele* v. *Arlington Five Cents Savings Bank*, 135 Mass. 142. Taking the law to be as stated by the Court, it would follow that only the damage physically suffered is to be paid for. When a title is taken, for instance, to the waters of a stream, it is held that the whole value of the title must be paid, although a considerable use may be left in fact to the party aggrieved. *Howe* v. *Weymouth*, 148 Mass. 605; *Imbescheid* v. *Old Colony Railroad Co.*, 171 Mass. 209. Flowage under the Mill Acts seems to be regarded as presenting the converse case. As no title is gained to have the water on the upper land, the dam owner pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified than could be sustained when the title is lost. So far as security goes, looking to the reasonable probabilities in such cases, it would seem to be sufficient. We must bear in mind, as we presume the State Court meant to suggest by its citation of the case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, [397,] that, as was said there in words that need but little change, if other remedies proved ineffectual, the "Court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam." In other words, the right to an injunction, if necessary, is taken into account in Massachusetts, in deciding whether the security for payment is sufficient, even when there is a taking by eminent domain. See also *Attorney General* v. *Old Colony Railroad*, 160 Mass. 62, 90. *Manigault* v. *Springs*, 199 U. S. 473, 485, 486. This seems an answer to the objection that in the state of the business of the courts a judgment for past damages may not be recorded for several years, that the defendant may be insolvent, the dam inadequate security, and valuable improvements destroyed. It is said that the lower owner might abandon his dam and thereby escape liability for gross damages after an election to take them. But we presume that in that case he would be held to pay the temporary damage caused and the case would stand like one where the choice had been the other way. *Hunt* v. *Whitney*, 4 Met. 603, 608.

Again, we cannot wholly neglect the long settled law and common understanding of a particular State in considering the plaintiff's rights. We are

bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a State. *Eldridge* v. *Trezevant*, 160 U. S. 452, 466. For a century the remedy given by the statute has been supposed to be sufficient, and in 1832 it was decided to be so under a somewhat similar statute which was held to create a servitude. *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467. We are not prepared to pronounce the statute void on the ground that the security for payment is not enough.

But is argued that not all the serious damage which is or may be suffered is compensated. It is said that only damages caused by flowing can be recovered. But the cases cited only show that damages regarded as too remote on general principles are disallowed, *Fuller* v. *Chicopee Manufacturing Co.*, 16 Gray, 46, or that not being within the protection of the Mill Acts they are to be recovered by an action at common law. *Eames* v. *New England Worsted Co.*, 11 Met. 570. And the statute now expressly provides for a "person whose land is overflowed or otherwise injured," § 4, and that the jury shall take into consideration any damage occasioned to other land as well as that to the land overflowed. § 14. A graver doubt is raised by another argument. It is decided that the prior right is gained by the dam first begun, provided it is completed and put in operation within a reasonable time. If, as in the present case, the upper owner builds a dam in the meantime, it may be held that he is entitled to no compensation for its being rendered useless, even if he builds without notice of the earlier appropriation, as well might happen. On the other hand if he refrains from using his land as he desires, he may be denied compensation for being deprived of the use of his land. We do not perceive why the latter result should follow. As to the former it may be held that, notwithstanding the priority of the lower owner, the upper owner has a right to improve his land until it actually is flowed. Otherwise the former might have it in his power to keep the latter in suspense for a year or two and then abandon his dam. Because the plaintiff was too late to prohibit the defendant's dam it does not follow that it may not be entitled to all the damages which it suffers when the flowing takes place. That it would be entitled to them perhaps may be inferred from *Baird* v. *Wells*, 22 Pick. 312, decided under a different statute but still applicable so far as this principle is concerned. See further *Storm* v. *Manchaug Co.*, 13 Allen, 10, 15; *Edwards* v. *Bruorton*, 184 Mass. 529, 532.

The State Court has confined itself to a general declaration that the act is valid and has not expressed itself definitely upon these points. Yet our opinion upon the constitutional question may depend upon its interpreta-

tation of the statute in a case which could not be brought here. Obviously it would be unjust that the plaintiff should be concluded upon a doubtful construction assumed by us which the State Court hereafter may not adopt. Therefore it seems to us proper that this bill should be dismissed without prejudice, or retained until the plaintiff's rights shall have been determined in the proceedings for damages under the statutes, which it is admitted have been brought. The objection to the act on the ground of want of notice does not impress us except in its bearing upon the point just mentioned. The right of the lower owner only becomes complete when the land is flowed, and, as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam subject to paying for the harm actually done, we see nothing to complain of in that regard.

Decree modified and affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.